

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON  
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY  
SITUATED,

Plaintiffs,

- *against* -

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants.

Lead Case No. 02-C-5893  
(Consolidated)

Judge Ronald A. Guzman  
Magistrate Judge Nan R. Nolan

**HOUSEHOLD'S RESPONSE TO PLAINTIFFS' MOTION TO  
COMPEL HOUSEHOLD TO PRODUCE DOCUMENTS IN  
THE POSSESSION AND CONTROL OF ITS ULTIMATE  
PARENT**

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Defendant Household International Inc. (“Household”) respectfully submits this response to Plaintiffs’ unnecessary and/or moot “Motion to Compel Production of Discovery and Issuance of Letters of Request under the Hague Convention.”

### ***Background***

As originally filed, Plaintiffs’ motion had three prongs. *First*, it sought the issuance of letters of request for discovery under the Hague Convention of HSBC Holdings plc (which is the ultimate parent, four times removed, of HSBC Finance Corporation, formerly known as Household International Inc.) and Morgan Stanley & Co. International Limited, both of which are located in London, England. Defendants consented to that prong of the motion because process under the Hague Convention is the correct means of pursuing discovery over foreign respondents. This Court thereafter agreed to or did issue letters of request in the form requested by Plaintiffs, thus rendering this aspect of the motion moot.

*Second*. Plaintiffs asked this Court to order Household to produce documents “held by” Morgan Stanley & Co. International Limited in connection with the latter’s work for HSBC Holdings plc with respect to that entity’s 2003 acquisition of Household. As Household represented to the Court through its counsel, it lacks the power to direct an unrelated British entity to produce documents, and Plaintiffs made no showing to the contrary. In any event, this aspect of the motion is also moot, because after the motion was filed, Plaintiffs’ counsel arranged with counsel for HSBC Holdings plc for the voluntary production of documents by Morgan Stanley & Co International Limited.

*Third*, Plaintiffs ask the Court to compel Household to produce London-based documents belonging to HSBC Holdings plc. This aspect of the motion does not warrant the detailed evidentiary analysis that Plaintiffs invite, because, *inter alia*,

(a) Plaintiffs are already —and more properly — seeking discovery of such documents under the Hague Convention;

(b) Plaintiffs have purported to serve several subpoenas on HSBC Holdings plc in the United States, such that the owner of the subject documents will be able to express its position directly when its response is served on October 20, 2006;

(c) through its U.S. counsel, HSBC Holdings plc has already agreed to make voluntary production of non-privileged documents located in the United States relating to the negotiation and evaluation of its 2003 acquisition of Household, subject to appropriate protection of confidential material;

(d) as noted, HSBC Holdings plc has also agreed to allow its investment advisor, Morgan Stanley & Co. International Limited, to release all documents in its possession relating to that transaction;

(e) the acquisition took place in the year after the close of the Class Period and therefore has no discernible bearing on Class Period events;

(f) there is a high likelihood that the documents Plaintiffs will receive from HSBC Holdings plc and Morgan Stanley & Co. International Limited will satisfy Plaintiffs' belated and unfocused interest in that post-Class Period transaction; and

(g) even though it was Plaintiffs' burden on this motion to prove that Household has the legal authority to control the documents of its successor's ultimate parent, and/or that HSBC Holdings plc was involved in the transactions underlying Plaintiffs' lawsuit (a temporal impossibility), at most Plaintiffs have strung together a pastiche of largely outdated disclosures to show that after March 2003, the two companies displayed certain normal (and minor) indicia of a parent/subsidiary relationship. This truism plainly does not vest Household with control over the documents of its ultimate parent, as the cases summarized below confirm.

In view of developments following the filing of this motion, the lateness of Plaintiffs' pursuit of discovery from the two British entities, and the marginal utility (if any) of the post-Class Period material Plaintiffs seek from those entities, it would be a waste of judicial resources for the Court to undertake a full evidentiary analysis of the current relationship between Household's corporate successor and its ultimate parent. Accordingly, Household respectfully suggests that the final prong of this motion be tabled until after Plaintiffs have received the documents they have been promised by HSBC Holdings plc and Morgan Stanley & Co. International Limited, at which time the parties and the Court will be in a better position to determine whether any further discovery is warranted in connection with the 2003 acquisition.

In the alternative, Household urges the Court to deny this prong of the motion (a) on the ground that it is moot insofar as Plaintiffs have already been promised voluntary compliance by the non-parties that actually control the subject documents, or (b) on the alternative ground that Plaintiffs have failed to satisfy their burden on this motion. The case law and factual considerations that support the latter result are summarized below.

*Argument*

**A. Plaintiffs' Flimsy Showing of Relevance Betrays a Desire Either to Fish for New Claims or to Harass Household and Its Parent for Strategic Reasons**

With respect to a Class Period ending in October 2002, Plaintiffs allege claims of securities fraud based on alleged misstatements or omissions regarding (i) alleged predatory lending practices; (ii) reaging of loan accounts; and (iii) the accounting treatment for specific credit card business contracts. In pursuit of those claims, Plaintiffs have already issued 86 interrogatories, received in excess of 4 million documents, and taken 28 depositions and counting. They just served their fourth and fifth sets of document demands on Defendants, and have issued hundreds of Requests for Admission. Although it is difficult to envision a more exhaustive discovery program or more comprehensive compliance, and although the firm deadline for concluding fact discovery is January 31, 2007, Plaintiffs show no sign of winding down or narrowing their focus to essential information. Instead, either to set the stage for avoiding the discovery cut-off, or to fish for a more viable claim, or to expand the level of oppression for strategic reasons (or a combination of all three), Plaintiffs have belatedly hit upon the idea of demanding all documents created in connection with Household's post Class Period acquisition by HSBC Holdings plc more than three years ago.

In their motion papers Plaintiffs visibly struggle — and plainly fail — to explain the alleged relevance of such material. After demonstrating at length the unsurprising fact that the March 2003 transaction was preceded by negotiations (*see* Pl. Br. at 3), Plaintiffs merely state without further explanation that Morgan Stanley’s “financial and business evaluation of Household, and information obtained in support thereof, will aid in establishing facts surrounding the reasons why HSBC was able to acquire Household at a deep discount to historic trading prices.” (*Id.* at 3-4) However, an outsider’s evaluation of Household after the close of the Class Period is plainly not probative of alleged falsity, materiality, scienter, loss causation, etc. for the period ending October 2002. The same can be said of any “facts surrounding the reasons” that HSBC Holdings plc made the decisions it did in the post-Class Period, especially considering that this entity was not affiliated in any way with Household during the relevant period. That some of the material reviewed by HSBC Holdings plc and its investment advisor was “non-public” says nothing about whether any such material is relevant or, if so, whether it is cumulative of the massive production Plaintiffs received directly from Defendants and its outside auditors during the course of this action.

In any event, as noted above, both Morgan Stanley & Co. International Limited and HSBC Holdings plc have already agreed to produce documents created or received in connection with the acquisition, making it unnecessary for the Court to rule on Plaintiffs’ insubstantial showing of relevance, and unnecessary for Plaintiffs to pursue the same information through indirect and insupportable means.

**B. Plaintiffs Have Not Satisfied Their Burden of Proving that Household Controls the Documents of its Ultimate Parent, Which By Definition Had No Transactional Overlap with Household During the Relevant Period**

The circumstances in which courts have required a subsidiary to produce documents in the possession of its foreign parent have nothing in common with the situation presented here. This is not a situation where, as in *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138 (N.D. Ill. 1979), a parent and subsidiary “operated as a single functioning unit in all aspects” of the business that was the subject of the lawsuit, or shared “managerial unity” in the form of a common chief operating officer who “exercised direct managerial control over the daily operations of both companies,” or used corporate formalities “as a screen to disguise the coordinated nature” of the enterprise that gave rise to the lawsuit. *See id.* at 1152-53. Plaintiffs have made no showing here remotely approaching those facts.

The *Uranium* case does have some relevance here, however, in that as to a different set of corporate affiliates, the court denied plaintiff’s motion to compel a subsidiary to produce its parent’s documents because, as here, the facts supposedly showing a “close managerial connection between the two corporations” were simply too scanty to support the requested inference. *Id.* at 1153. As this aspect of the *Uranium* case demonstrates, the mere fact that a parent-subsidiary relationship exists is insufficient to support a finding of subsidiary control, even where the affiliation existed during the relevant period. *Accord Playboy Entertainment Group, Inc. v. United States of America, et al.*, 1997 WL 873550, at \* 4 (D. Del. Dec. 11, 1997) (holding that proof that the president of a wholly-owned subsidiary was an officer of the parent, and that the parent’s CEO approved significant decisions regarding the subsidiary’s business operations was too “sparse” to support a production order, particularly given movant’s “failure to demonstrate that

[the subsidiary] can access [the parent's] documents in the ordinary course of business upon demand").

Plaintiffs also can take no comfort from the decision in *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127 (D. Del. 1986), which highlights the vast difference between evidence sufficient to support the requested order and Plaintiffs' paltry showing that Household and its ultimate parent occasionally shared a common director after the end of the class period.<sup>1</sup> In stretching to prove some structural overlap between the two companies, Plaintiffs completely ignore the other factors the court in *Afros* held to be of "of paramount importance" in resolving a motion such as this — namely, "the non-party's connection to the transaction at issue [and] to what degree will the non-party receive the benefit" of a favorable ruling in the case. *Id.* at 130. As shown by the following excerpts, the production order in *Afro* was plainly not founded on the sort of insubstantial structural facts that Plaintiffs offer here:

K MAG originally developed the patented devices [that were the subject of the lawsuit], but assigned the patents to KMC . . . approximately two months after Afros filed suit. . . . (*Id.* at 129)

In addition to being a wholly owned subsidiary, KMC's board consists of upper echelon K MAG employees who have substantial oversight responsibility in that corporation. Key decisions regarding this litigation . . . were made by a K MAG employee with no direct connection to KMC. . . .

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<sup>1</sup> Such a showing also stands in sharp contrast to the fact patterns in other cases cited by Plaintiffs, such as *Japan Halon Co. Ltd. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626 (N.D. Ind. 1993), in which the moving party produced extensive deposition testimony that evidenced "extreme closeness of Japan Halon and its parent corporations", and superseded Japan Halon's reliance on a hypertechnical secondment argument to try to explain away the fact that its four full time directors and business were employees of its parents.



KMAG's connection to the patent infringement counterclaim is undeniable. KMAG is responsible for the development of the UL mixing heads, and any question regarding the infringement will necessarily reference acts it performed. KMC is primarily the American sales arm of KMAG, even though it now owns the patents. Finally, KMAG would receive a direct benefit from a favorable judgment. . . . (*Id.* at 132)

The *Jaffe* Plaintiffs had to ignore the transactional relationship that the court in *Afros* characterized as "of paramount importance" because during the transactions upon which their lawsuit is based, HSBC Holdings plc and Household were not affiliated at all.

In view of the patent insufficiency of Plaintiffs' showing, and recent developments that have rendered or are likely to render this motion moot, it would be a waste of judicial resources and an undue burden for Defendants to embark on a full evidentiary analysis of an indirect corporate relationship that did not even begin until well after the end of the time period covered by this lawsuit — especially given Plaintiffs' utter "failure to demonstrate that [Household] can access [HSBC Holdings plc's] documents in the ordinary course of business upon demand". See *Playboy Entertainment Group, supra*, at \*4. There is nothing in Plaintiffs' motion that even suggests that improbable level of control, and merely saying that it exists does not make it so.

#### CONCLUSION

Plaintiffs' motion for an order compelling Household to produce the documents of HSBC Holdings plc should be denied in full.

Dated: October 16, 2006

Chicago, Illinois

Respectfully submitted,

EIMER STAHL KLEVORN & SOLBERG LLP

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**CERTIFICATE OF SERVICE**

Adam B. Deutsch, an attorney, certifies that on October 16, 2006, he caused to be served a copy of the HOUSEHOLD DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL HOUSEHOLD TO PRODUCE DOCUMENTS IN THE POSSESSION AND CONTROL OF ITS ULTIMATE PARENT, to the parties listed below via the manner stated.

/s/ Adam B. Deutsch

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