

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

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IN RE ROYAL AHOLD N.V.
SECURITIES & ERISA LITIGATION

-----X

Civil No.: 1:03-MD-01539

ALL SECURITIES ACTIONS

**LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
TO COMPEL ROYAL AHOLD N.V. AND U.S. FOODSERVICE, INC. TO COMPLY
WITH THE COURT'S MARCH 12,2004 ORDER AND TO PRODUCE WITNESS
STATEMENTS, MEMORANDA, INTERVIEW NOTES, AND RELATED MATERIALS**

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Lead Plaintiffs, the Public Employees' Retirement Association of Colorado ("COPERA"), and Generic Trading of Philadelphia, LLC ("Generic Trading"), respectfully submit this Memorandum of Law in support of their Motion to Compel Royal Ahold N.V. ("Ahold" or the "Company"), and U.S. Foodservice, Inc. ("USF"), (together, the "Ahold Defendants") to comply with the Court's March 12, 2004 Order (the "Order") (Docket No. 154) by producing all documents subject to the Order that the Ahold Defendants previously produced to outside agencies that have conducted and/or that continue to conduct investigations into the Ahold Defendants' admitted fraudulent overstatement of income and revenues. As set forth herein, the Ahold Defendants have either improperly redacted or withheld from production to Lead Plaintiffs copies of documents previously produced to third parties with interests adverse to the Ahold Defendants. Lead Plaintiffs also file this Memorandum of Law in support of their Motion to Compel the Ahold Defendants to produce to Lead Plaintiffs copies of all witness statements, memoranda, and interview notes (the "Interview Materials"), as well as transcripts of testimony before the United States Securities and Exchange Commission ("SEC") and all other related investigative materials pertaining to all persons interviewed in connection with the internal investigations into Ahold, USF, and numerous Ahold operating companies (the "Internal Investigations") ordered by Ahold's Audit Committee in 2003.¹

PRELIMINARY STATEMENT

A. Failure To Comply With The Court's March 12, 2004 Order - The Ahold Defendants Redact And Withhold Documents Previously Produced To Adversarial And Parties

The Court's March 12, 2004 Order requires the Ahold Defendants to produce to Lead Plaintiffs copies of all documents (other than witness statements and interview notes) that the

¹ As set forth herein and in the accompanying [Proposed] Order, Lead Plaintiffs seek to compel production of all Interview Materials other than those as to which the Government is able to maintain an objection to production.

Ahold Defendants previously produced to outside agencies conducting investigations into the Ahold Defendants' accounting practices and business affairs from January 1, 1998 through the present. The Ahold Defendants' continuing production of documents to Lead Plaintiffs (the "Production") pursuant to the Order nevertheless reveals that the Ahold Defendants have either withheld from production or produced in redacted form thousands of pages of documents that the Ahold Defendants have already produced to other adverse parties. Despite repeated attempts since February 2005, Lead Plaintiffs remain unable to obtain the Ahold Defendants' agreement to comply with the Order. Instead, the Ahold Defendants are claiming attorney-client privilege and/or work product protection for many of the documents relevant to the claims in this litigation that the Ahold Defendants voluntarily produced to other adversarial parties.

When it suited their desire for regulatory clemency, the Ahold Defendants deliberately waived any putative attorney-client privilege and/or work product protection applicable to any of the documents -- including the Interview Materials -- that they produced to the SEC, the Government, the Dutch Public Prosecutor, and other adversarial entities investigating the fraud at Ahold and USF.² In this litigation, however, the Ahold Defendants are withholding many of the same documents from Lead Plaintiffs by attempting to invoke the very protections that they elected to waive in order to obtain a prior litigation advantage. The law is clear that the protections from disclosure encompassed within the attorney-client privilege and the work product doctrine may not be used as a "sword" in one adversarial proceeding and as a "shield" in another. Simply stated, there is no selective waiver of the attorney-client privilege or work product doctrine. When the Ahold Defendants chose to waive any applicable protections from disclosure in turning documents over to the SEC, the Government and others, the Ahold

² Both the SEC and the Ahold Defendants' lawyers have highlighted the Ahold Defendants' cooperation in the SEC investigation, including the Ahold Defendants' willingness to "waive[] the attorney-client privilege and work product protection with respect to its internal investigations."

Defendants waived their right to assert any such protections to prevent disclosing the same documents to Lead Plaintiffs.

Before filing this Motion, Securities Action Lead Counsel conferred numerous times in writing and telephonically with counsel for the Ahold Defendants in an effort to obtain the Ahold Defendants' agreement to produce to Lead Plaintiffs identical copies of the relevant documents that the Ahold Defendants had produced to the SEC, the Government, and other outside regulatory authorities. In these communications, Lead Plaintiffs explained their position that the Ahold Defendants had waived any potentially applicable privilege over documents that they had produced to the SEC and the Government. The Ahold Defendants, however, asserted that they made document productions to the SEC and the Government pursuant to "an explicit agreement of confidentiality" (the "Confidentiality Agreement"). The Ahold Defendants have repeatedly stated that the Confidentiality Agreement operates to prevent the Ahold Defendants' production of documents to the SEC, the Government, and others, from constituting a waiver of any putative privilege or immunity from disclosure applicable to any such documents. The Ahold Defendants are incorrect.

The Confidentiality Agreement has nothing whatsoever to do with the attorney-client privilege or work product doctrine. It is frivolous to even suggest that a Confidentiality Agreement between Ahold and any adversarial party is a shield against Ahold's active and knowing waiver. Simply stated, the Ahold Defendants' production of the Interview Materials and other documents to the SEC, the Government, and other regulatory entities is a complete waiver of any attorney-client privilege and/or work product protection potentially applicable to such documents.

A party may not selectively waive attorney-client privilege or work product protection. In fact, accepting the Ahold Defendants' position would require this Court to hold that targets of criminal and civil investigations like Ahold can define by contract the legal significance of a waiver upon Lead Plaintiffs or any other adverse parties. There is no basis for such a position in law or fact. The attorney-client privilege and work product doctrine are not designed for such blatant tactical use and the Confidentiality Agreement does nothing to prevent the Ahold Defendants' prior waiver of attorney-client privilege and work product protection from constituting a waiver as to the Interview Materials and all other such documents in this litigation.³

The Ahold Defendants made a strategic decision to cooperate with the SEC and the Government by disclosing certain documents which may or may not have originally qualified for protection under the attorney-client privilege and/or work product doctrine. The law is clear that the result of the Ahold Defendants' strategy is that any putative privilege or other protection that may have been applicable to the documents at issue is waived as to all subsequent adversaries. The Confidentiality Agreement, made in the context of the Ahold Defendants' efforts to obtain leniency and avoid prosecution, does not change this result.

B. The Ahold Defendants' Claims Of Attorney-Client Privilege And Work Product Protection Over The Interview Materials Are Meritless

As with the documents subject to the Court's March 12, 2004 Order over which the Ahold Defendants are claiming protections from disclosure, the Ahold Defendants make meritless claims of attorney-client privilege and work product protection over the Interview Materials that Lead Plaintiffs requested in their First Requests for the Production of Documents (the "Document Requests"). First, the Interview Materials are neither attorney-client

³ See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 293, 303 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991).

communications nor attorney work product because they were prepared for business and regulatory purposes. Moreover, for the reasons stated above, the Ahold Defendants' production of the Interview Materials to the SEC and to other adverse parties waived all protection from disclosure that may otherwise have applied to the Interview Materials. Lastly, the Interview Materials served as the foundation and underlying details for the written reports (the "Reports") of the Internal Investigations -- which Reports were incorporated into Ahold's 2002 Form 20-F, given broad distributions for business and regulatory purposes and which were produced to Lead Plaintiffs and other adverse parties by Ahold without claiming or reserving *any* putative protection from disclosure over the Reports. Through the foregoing conduct, the Ahold Defendants waived claims of attorney-client privilege and work product protection over all information related to the Internal Investigations, including the Interview Materials.

For the reasons discussed above and set forth in greater detail below, Lead Plaintiffs respectfully request that the Court compel the Ahold Defendants to comply with the Court's March 12, 2004 Order by producing to Lead Plaintiffs copies of all documents subject to the Order and previously produced to the SEC, the Government, and *all* other regulatory entities in the same form that the Ahold Defendants made such prior productions. Lead Plaintiffs further request that, subject only to the Government's ability to maintain an objection to such production, the Court order the Ahold Defendants to produce copies of all Interview Materials generated and prepared in connection with the Internal Investigations.

STATEMENT OF FACTS

A. The Internal Investigations And The February 24,2003 Announcement

In November 2002, Ahold authorized an investigation into the circumstances pursuant to which the Company and its accountants at Deloitte & Touche had been consolidating the financial results of Ahold's ICA ("ICA") joint venture. By February 22,2003, the foregoing investigation revealed that Ahold had improperly consolidated the financial results of its ICA, JMR, Bompreco, Paiz Ahold, and Disco Ahold International Holdings ("DAIH") joint ventures (collectively, the "Joint Ventures").

During the time that Ahold was investigating the propriety of its accounting treatment for the Joint Ventures, the Company purportedly "learned" of a potentially significant overstatement of income attributable to improper accounting for vendor rebates / promotional allowances at its USF subsidiary. On or about February 12,2003, Ahold directed White & Case LLP, assisted by forensic accountants at Protiviti, Inc., to investigate the circumstances involving vendor rebate accounting at USF. (¶204.)⁴ Subsequently, the Audit Committee of Ahold's Supervisory Board directed the law firm of Morvillo, Abramowitz, Grand, Iason & Silberberg ("Morvillo") and forensic accountants at PricewaterhouseCoopers ("PwC") to conduct a further investigation into USF's accounting practices. Thus, prior to announcing its massive impending restatement on February 24,2003 (the "February 24,2003 Announcement"), Ahold had already commenced the

⁴ References to the Consolidated Amended Securities Class Action Complaint (the "Complaint") (Docket No. 122) are designated as (¶ __). By referring to certain paragraphs within the Complaint to support statements made herein, Lead Plaintiffs do not represent that the selected paragraphs are the only paragraphs within the Complaint that support the statement for which the selected paragraphs are referenced.

Internal Investigations. Indeed, Ahold admitted that the purpose of the Internal Investigations was "to enable our accountants to resume their audit work as quickly as possible."⁵

Ahold's Internal Investigations led to the Company's February 24, 2003 Announcement that Ahold anticipated restating USF earnings by at least \$500 million. The February 24, 2003 Announcement immediately caused devastating losses to Ahold's investors as the price of Ahold common stock trading on foreign securities exchanges plummeted by more than 63% to close at €3.59 per share, and the price of Ahold American Depository Receipts ("ADRs") trading on the New York Stock Exchange ("NYSE") plunged by 61%, to close at \$4.16 per share. In the February 24, 2003 Announcement, Ahold attributed the massive overstatement of income at USF to inappropriate accounting for vendor rebates / promotional allowances. In connection with the February 24, 2003 Announcement, Ahold's Supervisory Board Chairman, Henny de Ruiter, commented that the necessary restatement was "due primarily to overstatements of income related to promotional allowance programs at U.S. Foodservice." (§ 245.)

The findings of the Internal Investigations were summarized in the Reports prepared by professionals, including Morvillo, PwC, Wilmer Cutler & Pickering ("WCP"), and the Dutch law firm of DeBrauw Blackstone & Westbroek ("DeBrauw"), selected by or under the authority of Ahold's Audit Committee. The Reports are based upon, and in many instances directly quote from, the Interview Materials compiled during the Internal Investigations. Ahold disclosed a significant portion of the substance of the Reports in the 2002 Form 20-F (the "2002 Form 20-F") that the Company filed with the SEC on October 17, 2003, as amended on October 31,

⁵ See Ahold May 13, 2003 Press Release, Address by Henny de Ruiter, Chairman of the Ahold Supervisory Board, to the General Meeting of Shareholders, a copy of which is attached as Exhibit 45 to the December 19, 2003 Declaration of Andrew J. Entwistle In Support of Lead Plaintiffs' Motion For An Order Partially Lifting The Private Securities Litigation Discovery Stay (Docket No. 84) (the "December 19, 2003 Entwistle Declaration").

2003.⁶ (See also ¶¶ 290-309.) The 2002 Form 20-F also announced Ahold's restatement of the financial results that the Company issued during prior periods, including the period from July 30, 1999 through February 24, 2003 (the "Class Period").

In connection with Ahold's efforts to receive leniency from the SEC and the Government, the Company produced copies of the Reports, the Interview Materials, and other documents underlying the Internal Investigations to regulatory authorities with interests adverse to Ahold. According to the SEC, Ahold provided the Commission with copies of "the internal investigative reports, and the supporting information and waived the attorney-client privilege and work product protection with respect to its internal investigations." (See SEC Litigation Release No. 18929 (the "Litigation Release"), at 4.)⁷

B. The Regulatory Proceedings

Following Ahold's February 24, 2003 Announcement, regulatory authorities, including the SEC, the Government, and the Office of the Dutch Public Prosecutor, began proceedings related to the fraud that occurred at USF and at Ahold's Joint Ventures. (See ¶¶ 209-228.) In connection with these adversarial proceedings, Ahold and USF produced millions of pages of documents and agreed to waive any attorney-client privilege and/or work product protection applicable to such documents. (See *infra*, Statement of Facts, Section E; see also Government's Memorandum of Law In Support of Its Motion to Intervene and to Partially Continue the Current

⁶ See, e.g., 2002 Form 20-F at 64-72 (describing the results of the Internal Investigations). A copy of Ahold's 2002 Form 20-F is attached as Exhibit 1 to the December 19, 2003 Entwistle Declaration (Docket No. 84).

⁷ A copy of the Litigation Release entitled, "*SEC Charges Royal Ahold and Three Former Top Executives with Fraud; Former Audit Committee Member Charged with Causing Violations of the Securities Laws*" is attached as Exhibit A to the Affidavit of Andrew J. Entwistle in Support Lead Plaintiffs' Motion to Compel the Ahold Defendants to Comply with the Court's March 12, 2004 Order (the "Entwistle Affidavit"). Textual references to Exhibits attached to the Entwistle Affidavit are designated as "(Ex.—.)"

Stay of Discovery In the Securities Action and To Impose a Partial Stay of Discovery In the ERISA Action ("February 2004 Government Memorandum"), at 7 n.5) (filed under seal.)

C. Lead Plaintiffs' December 19,2003 Motion To Partially Lift The Private Securities Litigation Reform Act Of 1995 Discovery Stay And The Court's March 12,2004 Order

On December 19,2003, Lead Plaintiffs filed a motion to partially lift the Private Securities Litigation Reform Act of 1995 ("PSLRA") discovery stay (the "December 2003 Motion") (Docket No. 85) to obtain, among other things, copies of the documents that the Ahold Defendants had produced to outside agencies in connection with legal proceedings, inquiries and/or investigations relating to Ahold's accounting practices and/or business affairs.

On February 4, 2004, the Government filed a motion to intervene in this action and filed the February 2004 Government Memorandum requesting that the Court deny Lead Plaintiffs' December 2003 Motion insofar as it called for the production of Interview Materials and copies of the Reports (Docket No. 212). Based upon discussions with the Government, Lead Plaintiffs agreed, without prejudice, to withdraw their request for the Interview Materials, but continued to seek production of the Reports.

In its March 12,2004 Order (Docket No. 154) partially lifting the PSLRA discovery stay, the Court granted Lead Plaintiffs' motion "to the extent necessary to allow discovery of materials previously produced to outside agencies" conducting investigations into the fraud at Ahold and USF. In re *Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246,248 (D. Md. 2004).

Particularly, the Court ordered Ahold to produce:

...[A]ll documents and materials that Royal Ahold and USF have produced or provided in connection with inquiries or investigations by governmental, regulatory, or self-regulatory agencies with regard to Royal Ahold or USF's accounting practices or business affairs from January 1, 1998 through the present (excluding all witness statements, interview notes and investigative reports)...

Id. at 255. The Court temporarily stayed production of the Reports.⁸ By definition, the documents subject to the Order -- other than the Interview Materials -- are the same documents that Ahold and/or USF produced to various adversarial third parties pursuing claims related to Ahold's conduct, including the SEC and the Government.

D. Ahold's Agreement To Waive Attorney-Client Privilege And Work Product Protection Results In Clemency From The SEC

On October 13, 2004, the SEC filed a civil fraud complaint (the "SEC Complaint") against Ahold in the United States District Court for the District of Columbia alleging violations of certain reporting and record-keeping provisions of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act").⁹ The SEC Complaint alleges that Ahold's fraudulent inflation of promotional allowances at USF and the Company's improper consolidation of the financial results of the Joint Ventures caused Ahold's SEC filings for at least fiscal years 1999 through the first three quarters of 2002 to be materially false and misleading. In this regard, the SEC Complaint alleges that: (i) the fraud at USF resulted in Ahold overstating its income by more than \$800 million; and (ii) during fiscal years 1999 through 2001, Ahold overstated net sales by approximately \$25.8 billion based upon its fraudulent accounting for the Joint Ventures.

Also on October 13, 2004, the SEC issued the Litigation Release, which announced the terms of Ahold's settlement of the SEC action (the "SEC Settlement"). Pursuant to the SEC

⁸ The Government withdrew its August 30, 2004 Application to stay production of the Reports on October 21, 2004. (See October 21, 2004 letter from James G. Cavoli to the Honorable Catherine C. Blake (Docket No. 356).) On October 25, 2004 and October 29, 2004, Ahold produced copies of the Reports to Lead Plaintiffs. In so doing, Ahold did not attempt to claim attorney-client privilege and/or work product protection over any of the Reports. See the Ahold Defendants' October 25, 2004 and October 29, 2004 letters, copies of which are attached as Exhibits B and C, respectively, to the Entwistle Affidavit.

⁹ A copy of the SEC Complaint is attached as Exhibit D to the Entwistle Affidavit.

Settlement, Ahold consented to the entry of a judgment permanently enjoining the Company from violating the antifraud and other provisions of the federal securities laws action without admitting or denying any wrongdoing. Although the SEC characterized the Ahold case as "yet another deplorable example of a massive, multifaceted fraud at a major corporation," the Commission elected not to impose a monetary penalty upon Ahold.¹⁰ According to the Litigation Release, one of the primary reasons why the SEC did not fine Ahold was the fact that:

Ahold promptly provided the staff with the internal investigative reports and the supporting information and waived the attorney-client privilege and work product protection with respect to its internal investigations. Ahold also made its current personnel available for interviews or testimony, significantly assisted the staff in arranging interviews with, or testimony from, former Ahold personnel located in the United States and abroad.

(Litigation Release at 4.) Indeed, Ahold's counsel has celebrated the Company's election to "share[] the results of its investigations with the SEC" as resulting in a "precedent setting settlement", making Ahold a "model" for corporate cooperation.¹¹

E. The Ahold Defendants Claim Attorney-Client Privilege And Work Product Protection Over Documents Previously Produced To Regulatory Authorities

Beginning in November 2004, Lead Plaintiffs asked the Ahold Defendants to indicate whether pages of documents in the Production containing significant full and partial redactions were identically redacted in all productions of each such page that the Ahold Defendants made to the regulatory authorities referenced in the Order, including the SEC and the Government.¹² On

¹⁰ A copy of the SEC Press Release entitled, "*SEC Charges Royal Ahold and Three Former Top Executives with Fraud; Former Audit Committee Member Charged with Causing Violations of the Securities Laws*" is attached as Exhibit E to the Entwistle Affidavit

¹¹ Lawrence Byrne and Joseph Armao, "Carrot and Stick: Understanding the SEC's Agenda," *Compliance Week* November 2004. A copy of the foregoing article is attached as Exhibit F to the Entwistle Affidavit.

¹² A copy of Lead Plaintiffs November 1, 2004 letter is attached as Exhibit G to the Entwistle Affidavit.

February 27, 2005, the Ahold Defendants informed Lead Plaintiffs that the redactions made to documents in the Production are not identical to any redactions that may have been made in the documents that the Ahold Defendants produced to regulatory authorities.

On March 31, 2005, the Ahold Defendants produced Part I ("Part I") of the Privilege Log applicable to the Production. On April 4, 2005, Lead Plaintiffs sent a letter to counsel for Ahold regarding the Production (the "April 4, 2005 Letter").¹³ Among other things, the April 4, 2005 Letter addressed issues pertaining to Part I of the Privilege Log as well as Lead Plaintiffs' recognition that the Ahold Defendants had withheld from the Production approximately 20,000 pages of documents that Ahold produced to the Government (which the Government subsequently produced to defendants Mark Kaiser ("Kaiser") and Michael Resnick ("Resnick")). The April 4, 2005 Letter requested the Ahold Defendants' purported basis for withholding and redacting pages of documents that the Government, Kaiser and Resnick possess.

The Ahold Defendants responded to Lead Plaintiffs' April 4, 2005 Letter on April 13, 2005 and on April 15, 2005.¹⁴ In the foregoing correspondence, the Ahold Defendants: (i) produced a revised version of Part I of the Privilege Log; (ii) transmitted approximately 20,000 pages of documents that were produced to the Government, but were previously withheld from Lead Plaintiffs; and (iii) represented that Lead Plaintiffs would not receive all documents previously produced to the "Government."

On April 19, 2005 and April 25, 2005, Lead Plaintiffs sent letters asking that the Ahold Defendants inform Lead Plaintiffs of whether each document identified in the April 18, 2005

¹³ A copy of Lead Plaintiffs' April 4, 2005 letter is attached as Exhibit H to the Entwistle Affidavit.

¹⁴ Copies of the Ahold Defendants' April 13, 2005 and April 15, 2005 letters are attached as Exhibit I and Exhibit J, respectively, to the Entwistle Affidavit.

