

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

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

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Civil No.: 1:03-MD-01539

ALL SECURITIES ACTIONS

**MEMORANDUM OF LAW OF LEAD PLAINTIFFS,
THE PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF
COLORADO AND GENERIC TRADING OF PHILADELPHIA, LLC, IN
OPPOSITION TO THE MOTION OF ROYAL AHOLD N.V. AND U.S. FOODSERVICE,
INC. FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL**

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Lead Plaintiffs, The Public Employees' Retirement Association of Colorado ("COPERA") and Generic Trading of Philadelphia, LLC ("Generic Trading") (together, "Lead Plaintiffs"), respectfully submit this Memorandum of Law in Opposition to the Motion of Royal Ahold N.V. ("Royal Ahold" or the "Company") and U.S. Foodservice, Inc., ("USF") (together, "Ahold") (Docket No. 395) (the "Motion") for Certification of an Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b). Ahold's Motion fails to satisfy the stringent requirements of 28 U.S.C. § 1292(b). Thus, the Court should deny Ahold's request for the extraordinary remedy of § 1292(b) certification.

PRELIMINARY STATEMENT

In its December 21, 2004 Memorandum and Order ("Dec. 21, 2004 Mem.") (Docket Nos. 389 and 390, respectively), the Court properly denied Defendants' motions to dismiss the claims of foreign purchasers of Ahold common stock on foreign exchanges ("Foreign Investors"). After carefully considering the legal and factual issues presented, the Court determined that asserting subject matter jurisdiction over the Foreign Investors' claims under the Securities Exchange Act of 1934 ("Exchange Act") was consistent with Congress's desire that the United States not be used as a base to manufacture "fraudulent security devices for export, even when these are produced only to foreigners." Dec. 21, 2004 Mem. at 34-35 (citation omitted). Consistent with every other federal court to confront this issue, this Court decided that the Exchange Act may apply extraterritorially.

Ahold's § 1292(b) Motion asks the Court to grant the extraordinary remedy of an interlocutory appeal of the portion of the Court's December 21, 2004 Memorandum and Order denying Defendants' motions to dismiss the Foreign Investors' claims for lack of subject matter jurisdiction. As discussed in Section I below, certification under § 1292(b) is an exception to the general rule prohibiting piecemeal appeals, and should be granted sparingly and limited to

exceptional cases. For this reason, the Fourth Circuit strictly construes *all* of the following requirements of § 1292(b) that *must* be satisfied before a court can even *consider* granting an interlocutory appeal:

- the order appealed from must involve a controlling question of law;
- there must be substantial ground for a difference of opinion as to the controlling question of law; *and*
- immediate appeal of the order must materially advance the ultimate termination of the litigation

28 U.S.C. § 1292(b); *see also The President and Directors of Georgetown College v. Madden*, 660 F.2d 91, 97 (4th Cir. 1981). All of the foregoing prerequisites must be satisfied before the Court can determine whether to grant an interlocutory appeal. Ahold's Motion does not satisfy *any* of § 1292(b)'s requirements.

The prevailing view in this Circuit is that a controlling question of law is one whose resolution will completely terminate an action. *See Fannin v. CSX Transp., Inc.*, No. 88-8120, 1989 WL 42583, at *5 (4th Cir. April 26, 1989) (unpublished).¹ Some courts, however, have applied a slightly less stringent test that defines a controlling question of law as one that either terminates the action entirely or "materially affects the outcome of the litigation." *See In re G. Ware Travelstead v. Valazquez*, 220 B.R. 862, 865-66 (D. Md. 2000) (Blake, J.) (citations omitted). As discussed more fully in Section II below, a reversal of the Court's order denying Defendants' motions to dismiss the Foreign Investors' claims will neither terminate this action nor materially affect its outcome. Regardless of the decision of Ahold's Motion, Lead Plaintiffs will continue to litigate the *same* claims against the *same* Defendants based upon the *same* facts

¹ Unreported decisions are attached in alphabetical order as Exhibits 1-14 to the Affidavit of Andrew J. Entwistle in Support of Lead Plaintiffs' Opposition to the Motion of Royal Ahold N.V. and U.S. Foodservice, Inc. for Certification of an Interlocutory Appeal ("Entwistle Affidavit").

and evidence --just on behalf of a group of United States investors who purchased Ahold common stock and/or ADRs as well as on behalf of foreign purchasers of ADRs ("Domestic Investors"). The Order that Ahold seeks to certify does not involve a controlling question of law under either of the standards that courts within this Circuit have applied.

Moreover, as discussed in Section III below, there is no substantial ground for a difference of opinion over whether the Exchange Act applies extraterritorially. Every federal court to confront this question has determined that it is appropriate to assert subject matter jurisdiction in circumstances -- like those presented here -- when the United States is used as a base for committing securities fraud that injures investors overseas. Further, every court examining this issue has based its decision to assert subject matter jurisdiction on the "conduct test."

This Court's decision to apply the conduct test to evaluate subject matter jurisdiction over the Foreign Investors' claims is consistent with the decisions of every other court to examine this issue. The presence of different articulations of the conduct test outside of this Circuit does not constitute a substantial ground for difference of opinion under § 1292(b). All versions of the conduct test derive from Congress's intent that the United States not be used as a base to export fraud overseas. For this reason, all courts addressing this issue agree that when a nexus exists between United States-based conduct and foreign injury, it is appropriate to assert subject matter jurisdiction over such foreign investors' claims.

This Court has already determined that the Supreme Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) ("Hoffman-LaRoche") is simply not relevant to the extraterritorial application of the Exchange Act. *Hoffman-LaRoche* addressed issues of international comity under United States antitrust laws, an entirely distinct statutory

scheme. Thus, as discussed more fully in Section III (B) below, Ahold's contention that *Hoffman-LaRoche* may be read to limit the jurisdictional reach of the Exchange Act is nothing more than previously rejected speculation.

Ahold also fails to satisfy § 1292(b)'s requirement that an immediate appeal of the Court's decision may materially advance the ultimate termination of the litigation. This element focuses upon whether the appeal will help accelerate the time for trial. Ahold does not even attempt to satisfy this requirement. Ahold instead merely argues that an appeal of the Court's determination that it has subject matter jurisdiction over the Foreign Investors' claims may help Ahold refine its settlement strategy. As discussed in Section IV below, Ahold's contention that resolution of this issue may help it refine its settlement strategy is true of every unresolved factual and legal issue in every litigation. The potential to influence a party's settlement strategy is simply not sufficient to support an interlocutory appeal under § 1292(b).

Ahold fails to satisfy any of the requirements for certification of an interlocutory appeal under § 1292(b). Thus, there is no basis for the Court to even consider exercising its discretion to grant Ahold's Motion. For the reasons set forth above and discussed more fully below, Lead Plaintiffs respectfully request that the Court deny Ahold's Motion and permit Lead Plaintiffs to continue vigorously prosecuting this litigation on behalf of all investors damaged by Ahold's fraud.

STATEMENT OF FACTS²

In its December 21,2004 Memorandum, this Court carefully considered all of the arguments that Defendants and Lead Plaintiffs made concerning the Court's subject matter jurisdiction over the Foreign Investors' claims. ~~See~~ Dec. 21, 2004 Mem. at 24-38. Based upon

² The facts surrounding Ahold's massive fraud are now well known to the Court and they are discussed at length in the Court's December 21,2004 Memorandum. Accordingly, they will not be recited at length herein.

its analysis, the Court rejected Ahold's argument that the Exchange Act can never apply extraterritorially. See Dec. 21, 2004 Mem. at 27-28. In so doing, the Court determined, among other things, that the Court "has a significant interest in the claims of the foreign purchasers, given the plaintiffs' substantial allegations concerning Royal Ahold's allegedly fraudulent conduct in the U.S." *Id.* at 28. The Court further found that the Complaint's substantial allegations "concerning U.S. based securities fraud warrant scrutiny by a U.S. Court" *Id.* at 29. As part of its decision that the Exchange Act applies extraterritorially, the Court also rejected Ahold's argument -- raised again here -- that the Supreme Court's decision in *Hoffman-LaRoche* demonstrates that this Court does not have subject matter jurisdiction over the Foreign Investors' claims. See Dec. 21, 2004 Mem. at 27 (finding the Supreme Court's decision in *Hoffman-LaRoche* "both legally and factually distinguishable from the present dispute").³

The Court also examined the different articulations of the conduct test for evaluating subject matter jurisdiction over the Foreign Investors' claims. *Id.* at 29-35. The Court determined that the conduct test set forth in the Seventh Circuit's decision in *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659 (7th Cir. 1998) "best capture[d] the competing need to be 'cautious' in applying the U.S. securities laws to overseas transactions with the obligation to recognize Congress's desire that the United States not be used 'as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'" Dec. 21, 2004 Mem. at 34-35 (citing *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)). Applying the standard set forth in *Kauthar*, the Court evaluated the allegations set forth in the Complaint to determine whether "the conduct occurring in the United States *directly cause[d]* the plaintiffs alleged loss in that the conduct form[ed] a substantial part of the alleged fraud and [was]

³ The Court further stated that Ahold's argument that the Exchange Act should never apply extraterritorially "should be scrutinized according to the standards developed for securities claims, not those based on wholly distinct antitrust laws." Dec. 21, 2004 Mem. at 28 n.10.

material to its success." See Dec. 21,2004 Mem. at 35 (emphasis in original) (citing Kauthar, 149 F.2d at 667). Moreover, the Court evaluated whether the alleged conduct in the United States was "more than merely preparatory in nature." Id.

Reviewing the Complaint's allegations, the Court noted that "[a]pproximately \$885 million of the overall \$1.1 billion earnings restatement made by Royal Ahold was attributable to the improper recognition of promotional allowances in its U.S. operations." Id. at 36. The Court concluded that the vendor rebate accounting fraud at Ahold's United States subsidiaries "substantially contributed and indeed was material to Royal Ahold's success in attracting shareholders both in the U.S. and abroad." Id. at 37. The Court further determined that the Complaint adequately alleged that Ahold's February 24,2003 Announcement of a \$500 million restatement necessitated by United States-based vendor allowance accounting fraud caused the price of Ahold common stock trading on foreign exchanges to lose 63% of its value, "directly causing a financial injury to the foreign plaintiffs." Id. at 38. Based upon these findings, the Court held that the Complaint had alleged sufficient United States-based conduct to "justify asserting subject matter jurisdiction over the claims of foreign purchasers." Id.

On January 10,2005, Ahold filed its Motion (Docket No. 395) seeking certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of "that portion of [the Court's] Order dated December 21,2004, denying Defendants' motions to dismiss the claims of foreign purchasers of Ahold shares on foreign exchanges for lack of subject matter jurisdiction." (Ahold Motion at 1.)

ARGUMENT

I. CERTIFICATION OF AN INTERLOCUTORY APPEAL SHOULD BE GRANTED ONLY IN EXTRAORDINARY CIRCUMSTANCES

Granting leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) is an extraordinary remedy. See Fannin, 1989 WL 42583, at *2 (citing Tidewater Oil Co. v. United

