

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

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

Civil No.: 1:03-MD-01539

ALL SECURITIES ACTIONS

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LEAD PLAINTIFFS'  
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 Reply Memorandum of Law in Further Support of Lead Plaintiffs' 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) and to Produce Witness Statements, Memoranda, Interview Notes and Related Materials (Docket No. 511) (the "Motion")<sup>1</sup> and in Reply to the Ahold Defendants' Memorandum of Law in Opposition to the Motion (the "Ahold Mem.") (Docket No. 521).

### **PRELIMINARY STATEMENT**

In their Opposition to the Motion, the Ahold Defendants ask the Court to depart from settled Fourth Circuit law by making the following (erroneous) determinations:

- (i) The Interview Materials, which were admittedly gathered and prepared "to enable [Ahold's] accountants to resume their audit work as quickly as possible,"<sup>2</sup> *somehow* constitute attorney-client privileged communications and/or attorney work product;
- (ii) The Ahold Defendants' so-called "Confidentiality Agreements" with the Securities Exchange Commission (the "SEC") and the Office of the United States Attorney for the Southern District of New York (the "Government") *somehow* permit the Ahold Defendants to effectuate the precise selective waiver that established Fourth Circuit law prohibits; and
- (iii) The Ahold Defendants' admitted waiver of all protections from disclosure potentially applicable to the Reports of Ahold's Internal Investigations *somehow* failed to effectuate a subject matter waiver as to any Interview Materials and other documents underlying the Reports that the Ahold Defendants did not already actually produce to other adversaries.

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<sup>1</sup> Capitalized terms, as used herein and not otherwise defined, have the meanings given to such terms in 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 (Docket No. 511) (the "Opening Brief").

<sup>2</sup> 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 A to the Affidavit of Andrew J. Entwistle in Further Support of Lead Plaintiffs' Motion to Compel the Ahold Defendants to Comply with the Court's March 12, 2004 Order and to Produce Witness Statements, Memoranda, Interview Notes and Related Materials (the "Entwistle Affidavit").

Each of the above positions is contrary to the law in the Fourth Circuit as well as the decisions of the overwhelming majority of other Circuit Courts to consider these issues. The Ahold Defendants fail to fulfill their burden of establishing that: (i) the Interview Materials were privileged or protected in the first instance; and (ii) the Ahold Defendants did not waive all protections from disclosure potentially applicable to the Interview Materials and all other documents subject to this Motion. Thus, Lead Plaintiffs respectfully request that the Court grant Lead Plaintiffs' Motion in its entirety.

**A. The Interview Materials Are Neither Attorney Work Product Nor Privileged Communications**

The Interview Materials are neither attorney-client privileged communications nor attorney work product, and the Ahold Defendants' "Counterstatement of Facts" does not alter this reality. First, the Ahold Defendants admit that the Internal Investigations pertaining to the fraud at USF and at the Joint Ventures were well underway prior to the Company's February 24, 2003 Announcement. (*See* Ahold Mem. at 4-5.) The Ahold Defendants also admit that the additional investigations that Ahold commenced following the February 24, 2003 Announcement were undertaken to assess related accounting irregularities, internal control deficiencies, and mismanagement. (*See* Ahold Mem. at 5.) Thus, the Ahold Defendants admit that the Internal Investigations were not undertaken "because of" the prospect of litigation, as required for protection in the Fourth Circuit. Instead, the Ahold Defendants' recitation of the facts only confirms the Ahold Defendants' prior admission that Ahold pursued the Internal Investigations for distinct business purposes including: "enabl[ing] [their] accountants to resume their audit work as quickly as possible";<sup>3</sup> closing a €3.1 billion credit facility, which was preconditioned on

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<sup>3</sup> *See* Exhibit A to the Entwistle Affidavit.

completing the Internal investigations; and satisfying marketplace and investor relations concerns.

**B. The Ahold Letters Cannot Undo the Ahold Defendants' Waiver of All Protections From Disclosure**

There can be no doubt that producing documents to adversaries in an effort to obtain leniency -- as the Ahold Defendants did here -- waives all protections from disclosure that may have applied to such documents. Despite the clear decisions of the Fourth Circuit on this issue, the Ahold Defendants contend that their letters to the SEC and the Government (the "Ahold Letters") talismanically restore protections from disclosure that the Ahold Defendants affirmatively waived. In fact, the Ahold Letters -- which appear for the first time in connection with this Motion -- are neither confidentiality agreements nor agreements of any kind.

For example, Ahold's Letter to the United States Attorney's Office<sup>4</sup> is simply a letter, not countersigned by the Government. Ahold's Letter to the SEC, while countersigned, transfers (and thereby waives without limitation) to the SEC sole discretion to use the Ahold Defendants' documents for any purpose. The Ahold Letters do not preserve any privileges or protections, and the Ahold Defendants now simply ignore the SEC's clear statements of Ahold's waiver because the Ahold Defendants cannot refute 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.***

(Litigation Release at 4) (emphasis added.)<sup>5</sup>

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<sup>4</sup> See, February 20, 2004 Letter from Lawrence Byrne, Esq. to James Cavoli, Esq., a partially redacted copy of which is attached as Exhibit 5 to the June 27, 2005 Declaration of Douglas P. Baumstein (the "Baumstein Declaration") (Docket No. 521).

<sup>5</sup> A copy of SEC Litigation Release No. 18929 (the "Litigation Release") is attached as Exhibit A to the June 10, 2005 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 "June 10, 2005 Entwistle Affidavit").

Numerous Fourth Circuit decisions unmistakably instruct that: (i) producing attorney-client privileged communications to anyone outside the zone of the privilege waives the privilege as to all documents so produced; and (ii) producing attorney work product to an adversary constitutes “testimonial use” of such work product and waives all work product protection as to all documents so produced. Here, the Ahold Defendants voluntarily produced millions of pages of documents, including the Interview Materials, to known adversaries. In so doing, the Ahold Defendants waived any and all protections from disclosure that may have applied. The Fourth Circuit explicitly rejects the concept of a “selective waiver.” Thus, the Ahold Defendants cannot use the Ahold Letters to invoke as a “shield” the very same protections from disclosure that the Ahold Defendants knowingly waived as a “sword” to obtain leniency from other adversaries. Faced with similar circumstances, the Fourth Circuit and numerous courts have properly determined that the law of waiver is not susceptible to the tactical manipulation that the Ahold Defendants seek to employ, and Lead Plaintiffs respectfully submit that this Court should reach the same result.

In exchange for their voluntary waiver of all protections from disclosure potentially applicable to the documents that they produced to the SEC, the Ahold Defendants received the precise benefit that they desired: the SEC elected not to impose a monetary penalty. Ahold’s Letters do not vitiate the Ahold’s Defendants’ clear tactical decision to waive all protections from disclosure potentially applicable to the documents that the Ahold Defendants willingly shared with other adversaries in hopes of receiving clemency. Accordingly, Lead Plaintiffs respectfully request that the Court Order the Ahold Defendants to comply with the Court’s March 12, 2005 Order by producing full and complete copies of all documents that the Ahold Defendants previously produced to other adversaries.

**C. The Ahold Defendants' Production And Use of the Reports of the Internal Investigations Waived Any Protections From Disclosure Potentially Applicable To All Underlying Materials**

The Ahold Defendants concede that the “wide distribution” of the Reports of Ahold’s Internal Investigations “certainly waived” any potentially applicable protections from disclosure as to the Reports. (June 6, 2005 Hearing Tr. at 47.) In the Fourth Circuit, waiver of the attorney-client privilege and work product protection as to certain documents and materials effectuates a subject matter waiver, resulting in a forfeiture of attorney-client privilege and non-opinion work product protection for all underlying documents. Consequently, *even if* the Court determined that: (i) Ahold’s Letters operate to undo the Ahold Defendants’ waiver of privileges; or (ii) there are Interview Materials that the Ahold Defendants did not produce to the SEC, the Government, or anyone else (*see* Ahold Mem. at 5), Ahold may still *only* withhold information underlying the Reports that the Ahold Defendants demonstrate to be previously undisclosed opinion work product. Significantly, the Ahold Defendants have admitted that they cannot seek to claim any such protection for any of the witness statements. (*See* Ahold Mem. at 3.)

**ARGUMENT**

**I. THE INTERVIEW MATERIALS ARE NEITHER ATTORNEY WORK PRODUCT NOR PRIVILEGED COMMUNICATIONS**

**A. The Interview Materials Are Not Attorney Work Product**

The Ahold Defendants’ “Counterstatement of Facts” only confirms that the Internal Investigations were undertaken for distinct business purposes, rather than “*because of* the prospect of litigation.” *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) (emphasis added). The Ahold Defendants completely ignore the Chairman of Ahold’s Audit Committee’s May 13, 2003 admission that the Internal Investigations were undertaken “to enable [Ahold’s] accountants to resume their audit work as

quickly as possible.” Despite their attempt to paint a different picture, the Ahold Defendants do not dispute, and therefore concede, that: (i) issuing the Company’s audited 2002 financial statements was the impetus for *all* of the Internal Investigations;<sup>6</sup> and (ii) Ahold’s receipt of €3.1 billion in critical financing was conditioned upon completing the 2002 audit. (¶ 200).<sup>7</sup> Consequently, the Interview Materials were not prepared “because of” litigation and are not attorney work product. *See id.*

The Ahold Defendants do not claim that the Company pursued the Internal Investigations “because of” litigation; but instead argue that the Interview Materials “were created *under the shadow of* the governmental investigations and private litigations.” (Ahold Mem. at 20 (emphasis added) (also admitting that the Reports were “prepared for *both* litigation and non-litigation purposes”).) In the Fourth Circuit, the *timing* of the Internal Investigations is not controlling. It’s the *purpose* that counts. Here, the Ahold Defendants’ admission of the business purposes for the Internal Investigations, and their failure to advance a single argument supporting the notion that the Internal Investigations were undertaken “because of” litigation, demonstrates that the Interview Materials are not protected under the work product doctrine. *See National Union*, 967 F.2d at 984; *see also Hennessey v. U.S. Agency for Int’l Dev.*, No. 97-1133, 1997 U.S. App. LEXIS 22975, at \*17 (4th Cir. Sept. 2, 1997) (finding report prepared to “further the

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<sup>6</sup> *See, e.g.*, 2002 Form 20-F at 32, 64 (stating that the internal investigations had to be completed before Ahold’s accountants would agree to continue work on the audit of the Company’s 2002 financial statements; Exhibit 3 to the Baumstein Declaration).

<sup>7</sup> 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.

completion of the project” was not prepared “because of the prospect of litigation”) (citation omitted.)<sup>8</sup>

**B. The Interview Materials Are Not Attorney-Client Privileged Communications<sup>9</sup>**

Ahold’s dealings with its accountants, numerous disclosures in the Company’s 2002 Form 20-F, countless public statements, production of the Reports to the defendants and Ahold’s bankers (among others), and Ahold’s March 14, 2003 Letter to the SEC, all make it clear that Ahold *always* intended to disclose the results of its Internal Investigations to numerous persons outside the zone of any putative privilege.<sup>10</sup> The Interview Materials are, therefore, not attorney-client privileged communications because “the privilege does not apply to the situation where it is the intention or understanding of the client that the communication is to be made known to others.” *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984). *See United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982).

The Ahold Defendants’ premise their contention that the Interview Materials are privileged upon the Fourth Circuit’s decision in *In re Allen*, 106 F.3d 582 (4th Cir. 1997) and the Supreme Court’s decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). These arguments misconstrue Lead Plaintiffs’ position. In *Allen* and *Upjohn*, the courts addressed assertions of the attorney-client privilege in light of challenges that the attorneys in question

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<sup>8</sup> Unreported decisions are attached in alphabetical order as Exhibits D through I to the Entwistle Affidavit.

<sup>9</sup> Although the Ahold Defendants have failed to satisfy their burden of demonstrating that the Interview Materials are attorney-client privileged communications, the facts here demonstrate that this issue is *purely academic* because the Ahold Defendants effectuated a subject matter waiver of attorney-client privilege as to the Interview Materials and all other documents underlying the Internal Investigations a number of times, including when the Ahold Defendants used the Reports in connection with the 2002 Form 20-F and when they gave Lead Plaintiffs the Reports in October 2004. *See* Section III, *infra*.

<sup>10</sup> The Ahold Defendants contend that many of the Internal Investigations were authorized on March 24, 2003 -- after Ahold had promised to share the results of the Internal Investigations with the SEC. (*See* Ahold Mem. at 5-6; *see also* Exhibit 3 to the Baumstein Declaration.) As with the earlier Internal Investigations, the Company’s 2002 Form 20-F indicates that the additional Internal Investigations were urged by Ahold’s accountants to enable them to continue the 2002 audit. (*See* 2002 Form 20-F at 70; Exhibit 2 to the Baumstein Declaration.)

were acting in non-attorney capacities. *See Allen*, 106 F.3d at 601; *Upjohn*, 449 U.S. at 390. Here, Lead Plaintiffs' position -- which the Ahold Defendants ignore -- is different. The fact that Ahold used lawyers to conduct a forensic investigation of the Company's business practices does not, standing alone, convert such work into privileged communication. Regardless of who performed the work, Ahold's intention to publish and share the results of the Internal Investigations made it such that that the documents and materials generated in connection with the Internal Investigations "were never privileged in the first place." *United States ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1250 (D. Md. 1995) (internal investigation conducted with intent to publish results removes investigation and audit from privilege); *see also In re Grand Jury Proceedings*, 727 F.2d at 1356 ("statement or communication made by a client to his attorney with the intent and purpose that it be communicated to others is not privileged.") (quotation omitted); *United States v. Cohn*, 303 F. Supp. 2d 672, 685 (D. Md. 2003) ("If the document was prepared for purposes of simultaneous review by legal and nonlegal personnel, it cannot be said that the primary purpose of the document is to secure legal advice."); *In re McKesson HBOC, Inc. Sec. Litig.*, No. 99-CV-20743 (RMW), 2005 U.S. Dist. LEXIS 7098, at \*27 (N.D. Cal. Mar. 31, 2005) ("*Aronson*") ("the communications were not protected by attorney-client privilege when made because McKesson had clearly agreed to disclose attorney-client communications to third parties").<sup>11</sup>

## **II. THE AHOLD DEFENDANTS INTENTIONALLY WAIVED ALL PROTECTIONS FROM DISCLOSURE POTENTIALLY APPLICABLE TO DOCUMENTS PRODUCED TO OTHER ADVERSARIES**

The Ahold Defendants' repeatedly claim that they have not waived any protections from disclosure potentially available to all documents, including the Interview Materials, that they

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<sup>11</sup> Although this decision is flawed for other reasons discussed herein, the Ahold Defendants' heavy reliance upon *Aronson* indicates that the Ahold Defendants accept that the Interview Materials are not privileged.

voluntarily produced to other adverse parties because such prior productions to the Government and to the SEC were made “under an explicit agreement of confidentiality.” (*See, e.g.*, Ahold Mem. at 11.) Despite the Ahold Defendants’ arguments, there is no question that: (i) Ahold’s Letters cannot manufacture a prohibited “limited waiver”;<sup>12</sup> and (ii) such a self-serving manipulation would be contrary to the law of the Fourth Circuit. *See, e.g., In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988); *United States v. Jones*, 696 F.2d at 1072; *see also United States v. Cohn*, 303 F. Supp. 2d at 680; *Rambus, Inc. v. Infineon Tech. AG*, 220 F.R.D. 264, 275 (E.D. Va. 2004).<sup>13</sup> Lead Plaintiffs recognize that the Fourth Circuit has not yet determined the precise issue of whether a party can draft self-serving letters to effectuate a prohibited limited waiver, thus circumventing established Fourth Circuit law.<sup>14</sup> Nevertheless, the decisions of the Fourth Circuit provide more than adequate guidance for the Court to determine that Ahold’s Letters are nothing more than an improper attempt to manipulate the attorney-client privilege and the work product doctrine for a distinct and legally unsupportable tactical advantage.

**A. Lead Plaintiffs Do Not Concede That Any of the Documents That the Ahold Defendants Previously Produced to Other Adversaries Are Privileged Communications or Attorney Work Product**

The Ahold Defendants contend that Lead Plaintiffs’ decision to challenge the privilege assertions as to *all* of the documents that the Ahold Defendants produced to other adversaries

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<sup>12</sup> *See* February 20, 2004 Letter from Lawrence Byrne, Esq. to James Cavoli, Esq., a partially redacted copy of which is attached as Exhibit 5 to the Baumstein Declaration.

<sup>13</sup> Even the scant authority upon which the Ahold Defendants attempt to rely recognizes that accepting Ahold’s Letters requires embracing the doctrine of limited or selective waiver, which the Fourth Circuit soundly rejects. *See Aronson*, 2005 U.S. Dist. LEXIS 7098, at \* 36-40; *Saito v. McKesson HBOC, Inc.*, No. Civ. 18553, 2002 Del Ch. LEXIS 125, at \*22 (Del. Ch. Oct. 25, 2002).

<sup>14</sup> As explained in greater detail below, Ahold’s Letter to the Government is not an agreement of any kind. The February 20, 2004 Letter from Lawrence Byrne, Esq. to James Cavoli, Esq. (Exhibit 5 to the Baumstein Declaration) *does not bear the signature of anyone working on behalf of the Government.*

somehow indicates that Lead Plaintiffs do not challenge the privilege assertions concerning *any* of the documents identified on the Ahold Defendants' privilege log. (Ahold Mem. at 9, 10.)

This argument makes no sense.

Before filing the Motion, Lead Plaintiffs informed counsel for the Ahold Defendants on numerous occasions that Lead Plaintiffs believed that the Ahold Defendants had waived all protections from disclosure potentially applicable to the documents previously produced to the SEC and the Government.<sup>15</sup> Lead Plaintiffs also informed the Court that the Ahold Defendants' improper withholding and/or redacting of thousands of pages of documents previously produced to other adversaries could result in motion practice. (*See* March 1, 2005, March 31, 2005, and May 3, 2005 letters from Andrew J. Entwistle to The Honorable Catherine C. Blake; Docket Nos. 425, 456, and 479, respectively.) Lead Plaintiffs' election to pursue the logical and efficient course of filing the Motion rather than challenging the Ahold Defendants' improper withholding and/or redaction of documents on a document-by-document basis cannot be construed as a concession of the validity of any assertion of privilege over any of the documents identified on the Ahold Defendants' privilege log.<sup>16</sup>

In a recent decision based upon very similar facts, shareholder plaintiffs prevailed in their argument that a corporate defendant's production of 220,000 documents to the SEC waived any potential privilege that may have applied to such documents. *See In re Qwest Communications Int'l Sec. Litig.*, Civ. No. 01-CV-01451 (REB-CES) (May 31, 2005) (Slip Op. at 10)<sup>17</sup>

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<sup>15</sup> *See* Exhibits G, H, and N to the June 10, 2005 Entwistle Affidavit. In response to Lead Plaintiffs' questions concerning Volume I of the Ahold Defendants' privilege log, the Ahold Defendants produced approximately 20,000 pages of previously withheld documents. (*See* Opening Brief at 12.)

<sup>16</sup> In this regard, Lead Plaintiffs note that the Court's early recognition of the possibility that the Ahold Defendants may attempt to claim privilege over previously produced documents has no bearing upon the factual and legal questions of waiver that this Motion raises. (*See* Ahold Brief at 10.)

<sup>17</sup> A copy of this decision is attached as Exhibit F to the Entwistle Affidavit.

(“Notwithstanding the [actual] confidentiality agreement between Qwest and the SEC regarding the produced documents, Qwest’s voluntary choice to disclose certain documents to the SEC while withholding others indicates a waiver of the attorney-client and work-product privileges as to the disclosed documents.”) Here, the Ahold Defendants also produced certain documents to the SEC while withholding others, and this Court should reach the same result. (*See* Ahold Brief at 10 n.4.)<sup>18</sup>

**B. The Ahold Letters Fail To Fulfill the Ahold Defendants’ Goal of Using The Attorney-Client Privilege and Work Product Doctrine as Both a Sword and a Shield**

Even if this Court were inclined to find that a party may enter into an agreement with an adversary to reverse a waiver of privilege, Ahold’s Letters fail to accomplish this objective.

First, Ahold’s Letter to the Government *is not an agreement* at all. The Government was not asked to execute the document, and the Ahold Defendants have presented *no facts* demonstrating that the Government ever entered into any “explicit” agreement concerning any of the documents that the Ahold Defendants voluntarily provided. (*See* Exhibit 5 to the Baumstein Declaration.) Second, assuming that it were possible to turn settled contract law on its head and construe the February 20, 2004 Letter as an agreement, the record here indicates that the Ahold Defendants have nevertheless waived all protections potentially applicable at least to the Reports and the Interview Materials. A prior submission to the Court indicates that the Ahold Defendants provided the Government with copies of the Reports and the Interview Materials as of February 4, 2004.<sup>19</sup> Even in one of the few jurisdictions supporting the policy that a party can

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<sup>18</sup> Lead Plaintiffs reserve their rights to challenge the assertions of privilege on the Ahold Defendants’ privilege log on a document-by-document basis.

<sup>19</sup> *See* The Government’s Memorandum of Law In Support of Its Application to Intervene and to Partially Continue the Current Stay of Discovery In the Securities Action and to Impose a Partial Stay of Discovery in the ERISA Action, at 7 n.5 (filed under seal, February 4, 2004) (the “Feb. 2004 Gov. Mem.”). The Government did not contend that it entered into a confidentiality agreement with the Ahold Defendants. Instead, the Government represented that

effectuate a selective waiver through a confidentiality agreement, sharing documents with the Government *before* entering into any such agreement is a complete waiver. *See, e.g., Saito*, 2002 Del. Ch. LEXIS 125, at \*40 (waiver of all protection as to all documents provided to government before entering into confidentiality agreement).

The Ahold Defendants contend that the Fourth Circuit’s decision in *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981) supports their attempt to use the Ahold Letters to restore waived privileges. The Ahold Defendants are wrong. *Doe* instructs “when an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection.” *Id.* (citations omitted). Here, the Ahold Defendants voluntarily handed putatively protected materials to known adversaries -- an action that *Doe* instructs is a waiver of protections. *See id.* Further, Ahold’s Letters provided the SEC and the Government “sole discretion” to determine how, when and whether to disclose the documents that the Ahold Defendants produced to those agencies. (*See Exhibits 3, 4, and 5 to the Baumstein Declaration.*)<sup>20</sup> The Ahold Defendants’ election to surrender *all* potential privileges to the “sole discretion” of the SEC and the Government is completely contrary to the principles set forth in *Doe*, and instead demonstrates that the Ahold Defendants sent the Letters knowing that they could not reasonably expect to limit future use of the allegedly protected material. *See id.*; *see also Mayman*, 886 F. Supp. at 1252

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it received documents relating to the Internal Investigations based upon nothing more or less than an “understanding.”

<sup>20</sup> Indeed, the Government assured the Court that it will produce all Interview Materials to Lead Plaintiffs at the same time that it produces such materials to defendants Kaiser and Resnick. (*See June 6, 2005 Hearing Tr.* at 9, 43.) The Government also indicated that it was prepared to produce to Lead Plaintiffs copies of Interview Materials pertaining to witnesses as to which the Government has no objection. (*Id.* at 44.) The foregoing statements indicate that the aspirations expressed in Mr. Byrne’s February 20, 2004 letter to Mr. Cavoli do not restrain the Government in any way. (*See Exhibit 5 to the Baumstein Declaration.*)

(“selective disclosure for tactical purposes waives the privilege”) (quoting *Jones*, 696 F.2d at 1072).

Finally, the Ahold Defendants contend that their Letter to the SEC required the Commission “not to assert that the production of the Confidential Materials constituted ‘a waiver of the attorney-client, attorney work product, or other applicable privilege.’” (Ahold Mem. at 7.) But, the SEC’s Litigation Release clearly states that Ahold “*waived the attorney-client privilege and work product protection with respect to its internal investigations.*” (Litigation Release at 4) (emphasis added.) (See Exhibit A to the June 10, 2005 Entwistle Affidavit.)<sup>21</sup> Ahold’s Letters do not change the simple fact that the Ahold Defendants waived all protections over the documents that they produced to the SEC and the Government. See, e.g., *Jones*, 696 F.2d at 1072.

### **C. The Ahold Defendants Cannot Rewrite The Law of Waiver Through Self-Serving Letters Sent To Adverse Parties**

The Fourth Circuit *has* already heard and rejected the *precise* policy arguments that the Ahold Defendants seek to enlist as support for the efficacy of Ahold’s Letters. See *Martin Marietta*, 856 F.2d at 623 (rejecting argument that policy of “encouraging voluntary disclosure to regulatory agencies” could prevent a subject matter waiver of documents underlying information produced to Government); see also *Mayman*, 886 F. Supp. at 1249 (noting that in *Martin Marietta*, the Fourth Circuit recognized and rejected “countervailing policy concerns” such as “encouraging voluntary disclosure to regulatory agencies” as a basis for finding limited waiver). Because there is no basis for elevating the interests of government agencies above those

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<sup>21</sup> In a marketing article published shortly after the SEC announced its settlement with the Company, Ahold’s counsel claimed that the Ahold Defendants’ election to “share[] the results of its investigations with the SEC” resulted in a “precedent setting settlement”, making Ahold a “model” for corporate cooperation. (See Exhibit F to the June 10, 2005 Entwistle Affidavit.)

of private litigants, other Circuit Courts have also rejected the policy arguments that the Ahold Defendants attempt to advance in support of Ahold's Letters. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 293, 303 (6th Cir. 2002) ("plaintiff in a shareholder derivative action or a *qui tam* action who exposes accounting and tax fraud provides as much service to the 'truth finding process' as an SEC investigator");<sup>22</sup> *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 n.9 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991). Ahold's Letters fail to bind either the SEC or the Government,<sup>23</sup> and they certainly cannot bind Lead Plaintiffs or this Court.

Producing privileged and protected materials to an adversary amounts to: (i) a complete waiver of all attorney-client privilege and work product protection that may have applied to any of the documents produced; and (ii) a subject matter waiver of all attorney-client privilege and non-opinion work product protection that may have applied to any materials underlying the documents that were actually produced to the adversary. *See Hawkins v. Stables*, 148 F.3d 379, 384 (4th Cir. 1998); *Martin Marietta*, 856 F.2d at 626. The Ahold Defendants do not dispute

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<sup>22</sup> As the Private Securities Litigation Reform Act Conference Report makes clear, this securities class action:

is an indispensable tool with which defrauded investors can recover their losses without having to rely upon Government action. Such private lawsuits promote public and global confidence in our capital markets and help deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

*Conference Report on Securities Litigation Reform*, H.R. Conf. Rep. No. 104-369, at 29 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, and attached as Exhibit F to the May 2, 2005 Entwistle Affidavit. Here, the SEC failed to impose a monetary penalty upon the Ahold Defendants. Accordingly, this action will be the *sole* basis for the investors that Ahold defrauded to recover their losses.

<sup>23</sup> Among other things, no one acting on behalf of the Government either signed or was asked to sign the partially redacted putative "Confidentiality Agreement." (*See* Exhibit 5 to the Baumstein Declaration.) Further, the SEC letter gives all rights on the transferred materials -- including the right to disclose -- to the SEC, a fact that the SEC correctly concluded "***waived the attorney-client privilege and work product protection with respect to [Ahold's] internal investigations.***" (*See* Litigation Release, at 4, a copy of which is attached as Exhibit A to the June 10, 2005 Entwistle Affidavit.) The fact that the SEC understood (and publicly proclaimed) Ahold's conduct to be a complete waiver of all privileges and protections also wholly eviscerates the Ahold Defendants' attempt to rely upon positions that the SEC has taken in other cases (*See* Exhibit 1 to the Baumstein Declaration). If anything, the SEC's view of waiver here supports Lead Plaintiffs' position in its entirety.

that the Fourth Circuit rejects the so-called “selective waiver” doctrine and narrowly applies the attorney-client privilege and work product doctrine because such protections from disclosure interfere with the “full and free discovery of the truth” and are in “derogation of the public’s right to every man’s evidence.” *In re Grand Jury Proceedings*, 727 F.2d at 1355 (quotations omitted). *See In re Allen*, 106 F.3d at 600 (attorney-client privilege “‘interferes with the truth seeking mission of the legal process’ and is therefore not ‘favored’”) (quoting *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996); *see also United States v. Nixon*, 418 U.S. 683, 710 (1974) (“[E]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.”)).

Lead Plaintiffs respectfully submit that this Court should follow the decisions of the many courts that have addressed this issue and correctly determined that parties cannot undo waivers of attorney-client privilege and work product protection by entering into self-serving contracts with adversaries. *See, e.g., In re Columbia/HCA*, 293 F.3d at 293, 303; *Mass. Inst. of Tech.*, 129 F.3d at 684; *Westinghouse*, 951 F.2d at 1429; *In re Chrysler Motors Corp. Overnight Evaluation Prog. Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988) (work product waived when produced to government adversary despite confidentiality agreement); *see also In re Qwest Communications Int’l Inc. Sec. Litig.*, Civ. No. 01-cv-01451-REB-CES (Slip. Op. at 10) (May 31, 2005); *In re Lupron Marketing and Sales Practices Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004); *In re Tyco International, Inc. Multidistrict Litig.*, No 02-1335-B, 2004 U.S. Dist LEXIS 4541, at \*7-8 (D. N.H. Mar. 19, 2004); *In re Bank One Sec. Litig., First Chicago Shareholder*

*Claims*, 209 F.R.D. 418, 424 (N.D. Ill. 2002); *Bowne, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993).<sup>24</sup>

Allowing a party to negate a knowing waiver of any attorney-client privilege or work product protection based upon a putative contract with an adversary -- as the Ahold Defendants seek to have the Court do here -- would be inconsistent with principles underlying the Fourth Circuit's decisions in this context. *See In re Doe*, 662 F.2d at 1072 (work product waived when voluntarily produced to adversary); *Cohn*, 303 F. Supp. 2d at 679-80 (voluntary production to adversary waives privilege as to attorney-client communications) (collecting cases). Courts faced with facts similar to those present here have properly determined that confidentiality agreements with adversaries are nothing more than requests that the Government "assist in obfuscating the 'truth finding process.'" *In re Columbia/HCA*, 293 F.3d at 303; *see also Westinghouse*, 951 F.2d at 1429; *Tyco*, 2004 U.S. Dist LEXIS 4541, at \*7-8.<sup>25</sup>

The Ahold Defendants' attempts to use the Ahold Letters to hide information from Lead Plaintiffs is the very same effort to conceal information from the public that the Sixth Circuit rejected in *Columbia/HCA*. *Id.* The Ahold Defendants' tactics here are even more ironic when one considers that it is the Class itself that financed the Internal Investigations.<sup>26</sup> Nevertheless, the Ahold Defendants continue to attempt to hide the truth from Lead Plaintiffs and the other

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<sup>24</sup> *See also* Jerold S. Solovy & Robert L. Byman, *Unwaiver*, National L.J., Apr. 4, 2005, at 11; Kara Altenbaumer-Price, *Assessing the Risks of Sharing Internal Investigations*, National L.J., Mar. 21, 2005. Copies of the foregoing articles are attached as Exhibits B and C, respectively to the Entwistle Affidavit.

<sup>25</sup> In *Columbia/HCA*, the Sixth Circuit rejected Columbia's attempt to limit its knowing waiver of protections from disclosure through contract. The attorney-client privilege "is not a creature of contract, arranged between parties to suit the whim of the moment." *Id.* at 303. The court further observed that "[t]he investigatory agencies of the Government should act to bring to light illegal activities, not assist wrongdoers in concealing information from the 'public domain.'" *Id.* Here, the SEC investigation utterly failed to provide shareholders with any meaningful remedy.

<sup>26</sup> Ahold expended approximately €70 million in connection with the Internal Investigations. *See* Ahold's 2003 Annual Report at 5, a copy of which is attached as Exhibit 4 to the September 15, 2004 Entwistle Affidavit (Docket No. 335).

members of the Class. Numerous courts facing similar facts have appropriately rejected efforts to conceal the truth based upon putative “agreements” with adversaries. *See, e.g., In re Columbia/HCA*, 293 F.3d at 293, 303; *Mass. Inst. of Tech.*, 129 F.3d at 684; *Westinghouse*, 951 F.2d at 1429; *In re Chrysler Motors Corp.*, 860 F.2d at 846-47; *see also In re Qwest Sec. Litig.*, (Slip. Op. at 10); *In re Lupron*, 313 F. Supp. 2d at 12; *In re Tyco Multidistrict Litig.*, 2004 U.S. Dist LEXIS 4541, at \*7-8; *In re Bank One Sec. Litig.*, 209 F.R.D. at 424.

The Ahold Defendants misleadingly contend that “many courts” have held that a party does not waive protections from disclosure when that party produces protected communications to the Government subject to a confidentiality agreement. (*See* Ahold Mem. at 11, 13.) Despite the Ahold Defendants’ frequent citation to speculative *dicta* from cases that admittedly did not reach the issue, the Ahold Defendants point only to three unreported cases deciding that producing documents to the Government pursuant to a prior confidentiality agreement did not effectuate a waiver: *Aronson, Saito, and Maruzen Co. Ltd. v. HSBC USA, Inc.*, Case Nos. 00 Civ. 1079 & 00 Civ. 1512 (RO), 2002 U.S. Dist. LEXIS 13288, at \*3 (S.D.N.Y. July 23, 2002).<sup>27</sup> The foregoing cases are readily distinguishable on numerous grounds, the most notable of which is that the cases involved *actual* confidentiality agreements and were decided in jurisdictions that -- unlike the Fourth Circuit -- do not flatly reject the doctrine of selective waiver. *See Aronson*, 2005 U.S. Dist. LEXIS 7098, at\* 38-39 (also noting that McKesson and the Government were not in a clearly adversarial relationship); *Saito*, 2002 Del. Ch. LEXIS 125 at \*22 (admittedly acting as first Delaware court to adopt selective waiver); *Maruzen*, 2002 U.S. Dist. LEXIS

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<sup>27</sup> The Court’s decision in *Maruzen* is bereft of any substantive legal analysis. *See Maruzen Co.*, 2002 U.S. Dist. LEXIS 13288, at \*3. Unlike the facts presented here, the defendants in *Maruzen* obtained an actual agreement with the Government. *Id.* at 4-5.

13288, at \*3 (citing *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993).)<sup>28</sup> None of the decisions upon which the Ahold Defendants attempt to rely are persuasive authority in this Circuit, which explicitly rejects selective waiver. *See, e.g., Martin Marietta*, 856 F.2d at 623; *Jones*, 696 F.2d at 1072.

### **III. THE AHOLD DEFENDANTS' PRODUCTION AND USE OF THE REPORTS AFFECTED A SUBJECT MATTER WAIVER AS TO THE INTERVIEW MATERIALS AND ALL OTHER DOCUMENTS UNDERLYING THE INTERNAL INVESTIGATIONS**

The Ahold Defendants waived *all* claims of attorney-client privilege and work product protection as to all documents and materials -- including the Interview Materials -- that the Ahold Defendants *actually produced* to the SEC, the Government, and other adversaries.<sup>29</sup> The Ahold Defendants' voluntary production and use of putatively privileged and/or protected documents and materials relating to the Internal Investigations, however, also waived any potential claims of attorney-client privilege and/or protection for non-opinion work product for all materials -- such as the Interview Materials -- that relate to the subject matter of the Internal Investigations. *See In re Martin Marietta*, 856 F.2d at 623 (finding subject matter waiver of attorney-client privilege and non-opinion work product as to all materials underlying documents produced to the Government).

In evaluating a subject matter waiver, the "underlying details" of produced documents may consist of, among other things:

the communications relating the data, the document, if any, to be published concerning the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the [communication]. Copies of other documents, the contents

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<sup>28</sup> The Ahold Defendants' reliance upon *Steinhardt* is misplaced. Far from endorsing the practice of manufacturing a selective waiver through putative contracts with the Government, the court in *Steinhardt* merely refrained from rejecting such an effort, which the Second Circuit has never directly addressed. *Id.*

<sup>29</sup> *See* Section II, *supra*; *see also* Lead Plaintiffs' Opening Brief at 16-19.

of which were necessary to the preparation of the [communication], will also lose the privilege.

*United States v. (Under Seal)*, 748 F.2d 871, 875 n.7 (4th Cir. 1984). The Ahold Defendants concede that the Interview Materials are “underlying details” of the Company’s Internal Investigations. (*See, e.g.*, Ahold Mem. at 20) (notes, memoranda and other materials related to witness interviews are materials “underlying” the Reports of the Internal Investigations).<sup>30</sup> Thus, the Ahold Defendants’ independent production of the Reports to Lead Plaintiffs, among others, (as well as partial publication in the 2002 Form 20-F and elsewhere) affected a subject matter waiver as to all Interview Materials and other documents underlying the Internal Investigations that is outside the scope of even the broadest possible reading of Ahold’s Letters. Even assuming that the Ahold Defendants did not *actually produce* certain of the Interview Materials to the Government, the SEC, and other adversaries, the Ahold Defendants can *only* seek to assert opinion work product protection over such materials to the extent that (i) such materials were protected in the first place; and (ii) such opinions were not incorporated directly or indirectly into the Reports, the 2002 Form 20-F or any other previously published materials. *Id.*

**A. The Repeated References To The Reports Of The Internal Investigations In The Company’s 2002 Form 20-F Waived Protections From Disclosure Potentially Applicable To All of The Interview Materials**

The Audit Committee of Ahold’s Supervisory Board authorized the Internal Investigations so that: (i) the Company’s accountants could resume the 2002 audit; (ii) the Company could obtain €1 billion in critical financing (¶ 200); (iii) Ahold could issue its

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<sup>30</sup> *See also* The Government’s Memorandum of Law In Opposition to Defendants’ Motions for a Bill of Particulars (“Government Particulars Opp.”) at 15-16 (noting, for example, that USF Report “identifies key documents and categories of documents; outlines (and sometimes quotes from) investigative interviews of potential government witnesses ...”), filed in *U.S. v. Mark Kaiser and Michael Resnick*, 04-cr-733 (SHS) (S.D.N.Y.), and attached as Exhibit A to the May 2, 2005 Affidavit of Andrew J. Entwistle (Docket No. 474) (the “May 2, 2005 Entwistle Affidavit”).

restated financial results; and (iv) Ahold could attempt to rebuild public confidence. When Ahold filed its 2002 Form 20-F in October 2003, the document was replete with references to the substance and results of the Internal Investigations.<sup>31</sup> (See ¶¶ 290-309.) For example, the Company prefaced its 2002 Form 20-F by explaining the following concerning the restatements:

These accounting adjustments were primarily made to address accounting irregularities and other accounting errors made by us and our subsidiaries in the application of accounting principles generally accepted in The Netherlands (“Dutch GAAP”) and accounting principles generally accepted in the United States (“U.S. GAAP”) and to address other issues identified or confirmed through investigations performed by outside law firms and forensic accountants and during the fiscal 2002 year-end audit of our financial statements. Upon review of the aggregate impact of all of these adjustments, we concluded that restating our consolidated financial statements for fiscal 2001 and fiscal 2000 were required.

(2002 Form 20-F, at 1).

The foregoing representation, and other statements made throughout the 2002 Form 20-F, clearly expose the findings of Ahold’s Internal Investigations. Having placed the substance of such communications “in play,” the Ahold Defendants cannot now contend that the Interview Materials and other documents underlying the subject matter of the Internal Investigations are protected from disclosure. *See Martin Marietta*, 856 F.2d at 623; *see also Cohn*, 303 F. Supp. 2d at 679-80 (collecting cases). In this regard, it is unnecessary that a party actually quote from a particular communication to waive any privilege associated with it. “A summary, paraphrase or clear reference to the substance of a communication can waive the confidentiality of that communication.” *Mayman*, 886 F. Supp. at 1250; *see also In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 470 (S.D.N.Y. 1996) (“Disclosure of the substance of a privileged communication is as effective a waiver as a direct quotation since it reveals the ‘substance’ of the statement”). Thus, for any Interview Materials or other documents underlying the Internal Investigations that

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<sup>31</sup> *See, e.g.*, 2002 20-F at 64-72; Exhibit 2 to the Baumstein Declaration.

the Ahold Defendants did not actually provide to other adverse parties such as the Government and the SEC, the Ahold Defendants have waived any claims of attorney-client privilege and non-opinion work product protection. *See Hawkins*, 148 F.3d at 384 (citations omitted); *see also Martin Marietta*, 856 F.2d at 623-24.

**B. Ahold's Wide Distribution Of The Reports Waived All Protections From Disclosure Potentially Applicable To The Interview Materials**

The Reports of the Internal Investigations -- which the Ahold Defendants have produced to at least the Government, the SEC, the Company's bankers and accountants, Lead Plaintiffs, all parties to this litigation, and other adverse parties -- contain the findings of Ahold's Internal Investigations. Even assuming, which Lead Plaintiffs do not, that the Reports ever constituted attorney-client privileged communications and/or attorney work product, Ahold's actual production of the Reports to other adversaries waived any protections from disclosure that may have applied to the Reports. *See Martin Marietta*, 856 F.2d at 626.<sup>32</sup> More importantly, the Ahold Defendants' election to produce the Reports to Lead Plaintiffs and other parties in October 2004 affected a subject matter waiver of all attorney-client privilege and non-opinion work product protection that may have applied to all documents, including the Interview Materials, underlying the Reports. *Id.* at 625.<sup>33</sup>

As to copies of the Interview Materials that the Ahold Defendants did not actually produce to other adverse parties, the Ahold Defendants may only seek to protect from disclosure to Lead Plaintiffs any portion of those materials that the Ahold Defendants demonstrate is opinion work product that has not already been directly or indirectly incorporated into published

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<sup>32</sup> According to the Ahold Defendants, the "wide distribution" of the Reports "certainly waived" any potentially applicable protections from disclosure as to the Reports. (June 6, 2005 Hearing Tr. at 47.)

<sup>33</sup> Of course, Ahold has completely waived both opinion and non-opinion work product protection over any Interview Materials that the Ahold Defendants actually produced to the Government, the SEC, or other adversaries. *See Martin Marietta*, 856 F.2d at 626.

material. *See Martin Marietta*, 856 F.2d at 626. Opinion work product consists of “pure expressions of legal theory or mental impressions.” *Id.* If the Ahold Defendants intend to claim opinion work product protection over any of the documents underlying the Reports that the Ahold Defendants *did not actually produce* to another adverse party, then Ahold has the burden of demonstrating in each and every instance that such material: (i) is actually opinion work product; and (ii) that such opinion work product was not previously published directly or indirectly in whole or in part. *Id.* In their effort to satisfy this burden, the Ahold Defendants:

must include specific and detailed indications of where such work product is located in the documents to enable the district court to conduct an expeditious review and redact pure legal theories, impressions, or opinions in those documents or portions thereof that [the Ahold Defendants have] not actually disclosed to the government or others.

*Id.*<sup>34</sup>

Significantly, the Ahold Defendants have indicated that they cannot seek to claim opinion work product protection for any witness statements. (*See* Ahold Mem. at 3.) Accordingly, the Ahold Defendants’ subject matter waiver as to all witness statements made and gathered during the Internal Investigations *requires* the Ahold Defendants to produce *all* such documents to Lead Plaintiffs. *See Hawkins*, 148 F.3d at 384 (disclosure of privileged information “not only waives the privilege as to the specific information revealed, but also waives the privilege as to the subject matter of the disclosure”); *Martin Marietta*, 856 F.2d at 623 (same); *see also Mayman*, 886 F. Supp. at 1250 (same).

The Ahold Defendants can *only* attempt to convince the Court that that certain portions of interview notes and/or memoranda that the Ahold Defendants have not already produced to an adversary constitute opinion work product protectable under the above standard. To make this

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<sup>34</sup> Of course, the interview notes and memoranda prepared by the accounting firms that Ahold’s Audit Committee retained may not enjoy any protection as attorney work product. *See In re Grand Jury Proceedings*, 102 F.3d 748, 752 (4th Cir. 1996) (internal report prepared by non-lawyer is not subject to work product doctrine).

showing, the Ahold Defendants must follow the procedure outlined in *Martin Marietta* to enable this Court to make an *in camera* determination. *See id.* at 626. Once again, the Court need never undertake the *Martin Marietta* inquiry in this case because none of the Interview Materials are work product of any kind. (*See* Section I, *supra.*) In any event, actual opinion work product portions of the Interview Materials that the Ahold Defendants have not already produced to adversaries will necessarily be very limited. *See Id.* at 626 n.2 (“work product protection has been waived as to most of the internal notes and memoranda on these interviews which, by way of summarizing in substance and format the interview results, *Martin Marietta* used as the basis of its disclosure to the [G]overnment on its audit results.”).

**C. No Purported “Agreement” With Another Adverse Party Can Prevent Ahold’s Affirmative Conduct From Constituting A Subject Matter Waiver As To All Materials Underlying The Reports Of The Internal Investigations**

The Ahold Defendants concede that the “wide distribution” of the Reports “certainly waived” any potentially applicable protections from disclosure as to the Reports. (June 6, 2005 Hearing Tr. at 47.) In this Circuit, the foregoing admission means that the Ahold Defendants have affected a subject matter waiver of any attorney-client privilege and/or non-opinion work product protection that may apply to all materials underlying the Internal Investigations. *See Martin Marietta*, 856 F.2d at 625. On their own, the Ahold Defendants elected to produce the Reports to Lead Plaintiffs and to all other parties in this litigation without raising or attempting to reserve any putative protections from disclosure.<sup>35</sup> Thus, even a court inclined to accept the Ahold Defendants’ argument concerning the efficacy of the Ahold Letters would find those Letters wholly inapplicable to the Ahold Defendants’ unilateral determination to produce the

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<sup>35</sup> *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 June 10, 2005 Entwistle Affidavit.

Reports, which independently affected a subject matter waiver as to all protections from disclosure that may have been available to the Interview Materials and to all other documents underlying the Reports. *Id.* Accordingly, the Court may evaluate the subject matter waiver as to all materials underlying Ahold's Internal Investigations resulting from the Ahold Defendants' production of the Reports to Lead Plaintiffs without even considering Ahold's Letters.

**D. Lead Plaintiffs' Request for All Interview Materials Is Reasonably Calculated to Lead To the Discovery of Admissible Evidence**

The Ahold Defendants do not dispute that the Interview Materials underlying all of the Reports applicable to the Ahold parent company, USF, the Joint Ventures, Tops Markets, Inc., and Giant-Carlisle are relevant to the claims in the Complaint. (*See* Ahold Mem. at 21-22.) The Ahold Defendants, however, contend that the Interview Materials underlying the Reports concerning Ahold's other operating companies are irrelevant. (*Id.*) All of the Interview Materials are likely to contain, albeit to varying degrees, information relevant to Lead Plaintiffs' claims.

As the Ahold Defendants concede, the Audit Committee of Ahold's Supervisory Board authorized the Company-wide Internal Investigations "to enable [Ahold's] accountants to resume their audit work as quickly as possible"<sup>36</sup> and to assess whether accounting irregularities, internal control deficiencies, and mismanagement similar to that noted at USF and at Ahold's Joint Ventures existed in other Ahold operating companies. (*See* Ahold Mem. at 5.) Because all of the Internal Investigations examined similar misconduct on a Company-wide basis, the Interview Materials reflecting misconduct at one Ahold operating company likely refer to the same pattern of misconduct at other Ahold companies concerning which Lead Plaintiffs have alleged claims. Accordingly, Lead Plaintiffs' request for copies of the Interview Materials

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<sup>36</sup> *See* Exhibit A to the Entwistle Affidavit.

underlying all of the Reports is “reasonably calculated to lead to the discovery of admissible evidence” Fed. R. Civ. P. 26(b)(1).

### **CONCLUSION**

For all of the foregoing reasons, Lead Plaintiffs, the Public Employees’ Retirement Association of Colorado and Generic Trading of Philadelphia, respectfully request that the Court grant Lead Plaintiffs’ Motion to Compel in its entirety.

Dated: July 11, 2005

/s/

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