

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

MARTIN CONROY, GERARD MCCARTHY, and)
LOUIS VARELA, derivatively on behalf of Aflac,)
Incorporated,)

Plaintiffs,)

v.)

DANIEL P. AMOS, PAUL S. AMOS, II, DOUGLAS W.)
JOHNSON, CHARLES B. KNAPP, BARBARA K.)
RIMER, ELIZABETH HUDSON, W. PAUL BOWERS,)
JOSEPH L. MOSKOWITZ, MELVIN T. STITH,)

C.A. NO. 4:18-CV-00033-CDL

Defendants,)

-and-)

AFLAC, INCORPORATED,)

Nominal Defendant.)

SECOND DECLARATION OF DIMITRY JOFFE, ESQ.

I, Dimitry Joffe, Esq., hereby declare under the penalty of perjury as follows.

1. I am counsel to the Plaintiffs in this action, and I submit this declaration in support of Plaintiffs' opposition to Defendants' motions to dismiss the Complaint in this action.

2. Attached as Exhibit A hereto is a true and correct copy of Lisa Cassilly's letter to me dated March 17, 2017.

3. Attached as Exhibit B hereto is a true and correct copy of my letter to Ms. Cassilly dated March 20, 2017.

4. Attached as Exhibit C hereto is a true and correct copy of Ms. Cassilly's email to me dated March 27, 2017.

5. Attached as Exhibit D hereto is a true and correct copy of my email to Ms. Cassilly dated March 28, 2017.

6. Attached as Exhibit E hereto is a true and correct copy of Ms. Cassilly's letter to me dated March 30, 2017.

7. Attached as Exhibit F hereto is a true and correct copy of my letter to Ms. Cassilly dated April 3, 2017.

8. Attached as Exhibit G hereto is a true and correct copy of Ms. Cassilly's email to me dated April 4, 2017.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: April 9, 2018

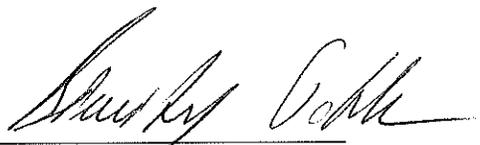


Dimitry Joffe (admitted *pro hac vice*)
JOFFE LAW P.C.
230 Park Avenue, 10th Fl.
New York, NY 10169
Tel: (212) 309-8711
Email: dimitry@joffe.law

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I, Dmitry Joffe, hereby certify that on this 9th day of April, 2018, I caused a copy of the Second Declaration of Dmitry Joffe, Esq., with exhibits thereto, to be served electronically upon the registered participants in this case through the ECF system



Dimitry Joffe
Counsel for the Plaintiffs

EXHIBIT A

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax: 404-253-8545
www.alston.com

Lisa H. Cassilly

Direct Dial: 404-881-7945

Email: lisa.cassilly@alston.com

March 17, 2017

VIA EMAIL & U.S. MAIL

Dimitry Joffe, Esq.
Joffe Law P.C.
230 Park Avenue, 10th Floor
New York, NY 10169

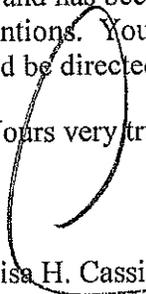
Andrew St. Laurent, Esq.
Harris, St. Laurent & Chaudhry LLP
40 Wall Street, 53rd Floor
New York, NY 10005

Re: Aflac, Incorporated and American Family Life Assurance
Company of Columbus (collectively "Aflac")

Dear Messrs. Joffe and St. Laurent:

Aflac and members of its Board of Directors are in receipt of your recent correspondence. This firm is counsel to Aflac and has been engaged to represent Aflac in connection with your clients' claims and contentions. You are hereby notified that all future communications concerning same should be directed to my attention.

Yours very truly,


Lisa H. Cassilly

LHC:bkr

cc: Thomas P. McKenna, Esq.

LEGAL02/37051219v1

EXHIBIT B



The Helmsley Building
230 Park Avenue, 10th Fl.
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T: +1.212.309.8711
F: +1.212.808.3020
E: dimitry@joffe.law

By Email

Lisa H. Cassilly, Esq.
Alston & Bird
One Atlantic Center
1201 West Peachtree St.
Atlanta, GA 30309-3424

March 20, 2017

Re: AFLAC

Dear Ms. Cassilly:

Thank you for your letter of March 17, 2017, to me and my co-counsel Mr. St. Laurent. I sincerely hope that we would be able to achieve a just, speedy and inexpensive resolution of this matter in the interests of our respective clients, and in a courteous and professional manner.

Speaking of our respective clients, I understand from your letter that you represent Aflac. Do you also represent Aflac's top executives Messrs. Amos and Amos III, alleged to have been aware of and participated in the fraud? Do you represent Messrs. Meier, Fennell and Whelan, who are the current defendants, along with Aflac, in Mr. Conroy's OSHA action?

Also, do you represent Aflac's Board of Directors and/or its independent directors? I note that your letter states that you are in receipt of our recent correspondence to members of Aflac's Board. That correspondence was addressed to the independent directors of Aflac, not to Aflac itself, and called for the Board's internal investigation of our allegations. If you do not represent them, please confirm that Aflac has forwarded our correspondence to its intended recipients.

Very Truly Yours,

A handwritten signature in cursive script that reads 'Dimitry Joffe'. The signature is written in black ink and is positioned above the printed name.

Dimitry Joffe

cc: Andrew St. Laurent

EXHIBIT C

(11) Aflac

- 03/20/2017 (a year ago) ☆
From: Dimitry Joffe <dimitry@joffe.law>
- 03/20/2017 (a year ago) ☆
From: Cassilly, Lisa <Lisa.Cassilly@alston.com>
- 03/20/2017 (a year ago) ☆
From: Dimitry Joffe <dimitry@joffe.law>
- 03/27/2017 (a year ago) ☆
From: Dimitry Joffe <dimitry@joffe.law>
- 03/27/2017 (a year ago) ☆
From: Dimitry Joffe <dimitry@joffe.law>
- 03/27/2017 (a year ago) ☆
From: Cassilly, Lisa <Lisa.Cassilly@alston.com>

To: Dimitry Joffe, Andrew St. Laurent

Show details

Mr. Joffe:

Alston & Bird represents Aflac Incorporated and American Family Life Assurance Company of Columbus (“Aflac”), as well as the individual Respondents named in Mr. Conroy’s OSHA complaint. While we are not aware of any legal claims asserted against Messrs. Amos or any director of Aflac’s Board of Directors, we have also been engaged on their behalf to serve as your point of contact for any communications regarding your clients and their contentions pertaining to Aflac, its business operations and their relationships with Aflac .

This is also to confirm that, as you were earlier advised by Douglas Johnson, Lead Non-Management Director of Aflac’s Board of Directors, your correspondence was distributed to the Non-Management Directors who already were informed of your clients’ allegations and Aflac’s due diligence efforts regarding same.

Sincerely,
Lisa Cassilly

Lisa H. Cassilly
 Alston & Bird LLP
 Atlanta Direct Dial: 404-881-7945
 NYC Direct Dial: 212-905-9155
www.alston.com
 Atlanta Beijing Brussels Charlotte Dallas Los Angeles New York
 Research Triangle Silicon Valley Washington DC

EXHIBIT D

(4) Aflac

From: **Dimitry Joffe** <dimitry@joffe.law> 03/28/2017 (a year ago)

To: lisa.cassilly@alston.com, Andrew St. Laurent
 Sent

Show details

Dear Ms. Cassilly,

Thank you for your clarification. As I understand from your response, Alston & Bird LLP represents Aflac, as well as Ken Meier, Trevor Fennell and Rick Whelan, defendants in the OSHA complaint, and does not represent any other parties.

Yet, the precise nature of your relationship to those other parties -- Messrs. Amoses, Aflac's Board of Directors, and the individual non-management directors -- remains elusive. It does not appear from your reply to be that of attorney-client, with its protection of client confidences, attorney-client communications, attorney's work product, and many other carefully defined privileges and immunities, and the underlying fiduciary obligations.

On the other hand, your email states that you have been "engaged on their behalf to serve as your point of contact for any communications regarding your clients and their contentions pertaining to Aflac." Please explain the meaning and the scope of this "point of contact" engagement: do you serve merely as the directors' "c/o" addressee? There is already Corporate Secretary for that. Do you intend to act as the Board's appointed agent, in which case what is nature and the scope of your agency? Do you intend to act as their de facto counsel? Do you intend to share our communications to the independent directors or other persons **you do not represent** with your clients? Do you intend to respond substantively on behalf of your non-clients? If yes, on what authority?

These are not idle questions -- they go to the heart of the matter, and their significance should be readily apparent. For the meantime, unless you tell me that Alston & Bird LLP or another law firm is counsel to Messrs. Amoses, the Board, and the individual non-management directors, we shall treat them as unrepresented parties.

Best regards,
Dimitry Joffe

This email is secured.

From: Dimitry Joffe <dimitry@joffe.law> 03/28/2017 (a year ago)

Sent

From: Martin Conroy <mfconroy@hotmail.com> 03/28/2017 (a year ago)

From: Martin Conroy <mfconroy@hotmail.com> 03/28/2017 (a year ago)

EXHIBIT E

ALSTON & BIRD

One Atlantic Center
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Lisa H. Cassilly

Direct Dial: 404-881-7945

Email: lisa.cassilly@alston.com

March 30, 2017

VIA EMAIL & U.S. MAIL

Dimitry Joffe, Esq.
Joffe Law P.C.
230 Park Avenue, 10th Floor
New York, NY 10169

Re: Aflac, Incorporated and American Family Life Assurance
Company of Columbus (collectively "Aflac")

Dear Mr. Joffe:

Your letter sent to Douglas W. Johnson on March 28, 2017 ignored (1) my letter dated March 17, 2017 advising that Alston & Bird LLP is counsel to Aflac and has been engaged to represent Aflac in connection with your clients' claims and contentions; (2) Mr. Johnson's letter dated March 20, 2017 instructing that you should direct your communications to my attention; and (3) my email dated March 27, 2017 informing you that Alston & Bird also has been engaged on behalf of Aflac's Board of Directors to serve as your point of contact for any communications regarding your clients and their contentions pertaining to Aflac, its business operations and their relationships with Aflac.

Surely, you are aware that Rule 4.2 of the New York Rules of Professional Conduct provides that a lawyer representing a client "shall not communicate ... about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Not only did you knowingly violate this Rule, you acknowledged in your letter to Mr. Johnson that he instructed you to direct your correspondence to me, but then falsely asserted that I advised you that neither I nor Alston & Bird LLP represent Mr. Johnson "personally or other non-managing directors of Aflac in this matter." As you well know, you and I have never spoken and my written exchanges with you include no such statement.

It is evidently your theory that you need not comply with Rule 4.2 because you intended to communicate with Mr. Johnson in his "personal" capacity. Putting aside that it is disingenuous to pretend your letter was a purely personal correspondence when it was addressed to Mr. Johnson as Chair of the Audit and Risk Committee of Aflac Incorporated, Rule 4.2 does not allow for the distinction upon which you rely. The New

Dimitry Joffe, Esq.
March 30, 2017
Page 2

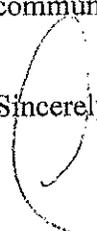
York State Bar Association has determined that the definition of “party” as used in Rule 4.2 is not limited to formal parties to litigation, but rather “applies to represented witnesses, potential witnesses and others with an interest or right at stake....” Ethics Opinion 735 (2001). More particularly, under New York law, the directors of a corporate client are included in the definition of “party” for purposes of Rule 4.2’s no-contact rule. The case *AIU Ins. Co. v. The Robert Plan Corp.*, 851 N.Y.S.2d 56, 2007 WL 2811366 (Sup. Ct. N.Y. County 2007) is on point. Like you, plaintiffs’ counsel in *AIU Insurance Co.* sent a letter directly to the board of directors of the defendant corporation (“TRP”). The court ruled that their actions violated the no-contact rule, observing as follows:

Plaintiffs’ counsel does not deny sending the letter to the directors, but contends that TRP’s counsel never indicated that it also represents the directors in their personal capacity, and that the letter was copied to TRP’s counsel. However, the prohibited communications under DR 7–104 [the previous version of New York’s no-contact rule] extend to any direct communication by adversary counsel with the directors of a defendant corporation.

Id. at *14 (emphasis added).

Suffice it to say that we expect that you will cease contacting Aflac and its directors immediately and forward all future communications regarding these matters to my attention.

Sincerely,


Lisa H. Cassilly

LHC:bkr

cc: Andrew St. Laurent, Esq.
Thomas P. McKenna, Esq.

LEGAL02/37075973v2

EXHIBIT F



Joffe Law P.C.

The Helmsley Building
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By Email

April 3, 2017

Lisa H. Cassilly, Esq.
Alston & Bird
One Atlantic Center
1201 West Peachtree St.
Atlanta, GA 30309-3424

Re: AFLAC

Dear Ms. Cassilly:

Your answer to a very simple question -- whether you or your law firm Alston & Bird LLP is counsel to Aflac's executives Messrs. Amoses, to Aflac's Board, and/or to its non-management members in the matter of the alleged massive fraud at Aflac -- has gone from unclear, to elusive, to downright evasive.

Your initial letter of March 17, 2017, left it unclear whether you or Alston & Bird LLP represent only Aflac or these other parties as well. Accordingly, by letter dated March 20, 2017, I expressly sought clarification from you regarding the scope of your representation:

Do you also represent Aflac's top executives Messrs. Amos and Amos III, alleged to have been aware of and participated in the fraud? Do you represent Messrs. Meier, Fennell and Whelan, who are the current defendants, along with Aflac, in Mr. Conroy's OSHA action? Also, do you represent Aflac's Board of Directors and/or its independent directors?

When you failed to respond to my letter for seven days, I again wrote to you on March 27, 2017, with the very same questions. Later that day, you answered those questions by email as follows (emphasis added): "Alston & Bird *represents* Aflac Incorporated and American Family Life Assurance Company of Columbus ("Aflac"), as well as the individual respondents named in Mr. Conroy's OSHA complaint." By contrast, with respect to Messrs. Amoses and Aflac's non-management directors, your letter stated the following:

While we are not aware of any legal claims asserted against Messrs. Amos or any director of Aflac's Board of Directors, we have also been engaged on their behalf *to serve as your point of contact* for any communications regarding your clients and their contentions pertaining to Aflac, its business operations and their relationship with Aflac.

Having received your response, I wrote back the next day, on March 28, 2017:

I understand from your response [that] Alston & Bird LLP represents Aflac, as well as Ken Meier, Trevor Fennell and Rick Whelan, defendants in the OSHA complaint, and does not represent any other parties. Yet, the precise nature of your relationship to those other parties – Messrs. Amoses, Aflac’s Board of Directors, and the individual non-management directors remains elusive. It does not appear from your reply to be that of attorney-client

My March 28, 2017 email to you, sent at 11:20 am, then attempted to clarify the scope and nature of your purported “point of contact” engagement, and concluded: “unless you tell me that Alston & Bird LLP or another law firm is counsel to Messrs. Amoses, the Board, and the individual non-management directors, we shall treat them as unrepresented parties.” Having received no response from you by close of business that day, I also mailed a letter to Aflac’s lead non-management director Mr. Johnson, copying you and alerting Mr. Johnson to the fact that the Board might have been misled by current management concerning the alleged fraud at the Company, and calling for independent investigation of my clients’ allegations.

As should be obvious from the cited correspondence, your statements have clearly established that Alston & Bird is counsel to Aflac and its executives Messrs. Meier, Fennell and Whelan, and is *not* counsel to Messrs. Amoses, the Board, or the individual non-managing directors, having been rather engaged by them as their “point of contact.”¹

On March 30, 2017, you responded to my attempt to clarify the scope of your “point of contact” engagement by evading those questions and instead attacking me for purportedly violating the “no contact” Rule 4.2 of the New York Rules of Professional Conduct arising out of my March 28, 2017 letter to Aflac’s lead non-management director. Notably, nowhere in your March 30 letter, or in all of your prior correspondence, do you state that you represent Mr. Johnson as counsel.

Rule 4.2 states that “a lawyer shall not communicate about the subject of representation with a party” whom the lawyer “knows to be represented by another lawyer in the matter.”

The question here is not whether Mr. Johnson is considered a “party” for purposes of Rule 4.2, but rather, assuming that he is, whether he is “represented by another lawyer” in this matter and whether I knew about it at the time of my letter to Mr. Johnson. As shown above, you never stated in response to my direct questions that Mr. Johnson is represented by you, Alston & Bird, or any other counsel. To the contrary, by expressly representing that you are counsel to Aflac and Messrs. Meier, Fennell and Whalen, while at the same time you are merely a “point of contact” for the others, including Mr. Johnson, you have made it clear that you do not represent them as counsel, even though the precise nature of your “point of contact”

¹ Of course, these parties could have engaged you in any capacity other than their counsel – as a “point of contact” or as anyone else for that matter – which engagements obviously do not equate with legal representation.

representation remains uncertain. I direct your attention in this regard to NYSBA Opinions 663 (1994), which first states the general rule:

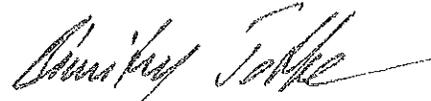
[I]f a lawyer “has not been advised whether . . . the [opposing party] is represented by counsel, the lawyer does not “know” whether [that party] is represented by counsel,” and . . . therefore communication with the client is permitted. . . . Where a lawyer does not know that the opposing client is represented by counsel, he or she “is free to communicate with that person on any and all subjects.”

The Opinion goes on to address the situation of a “recalcitrant attorney who will not confirm or deny the claimed relationship,” and concludes that “[a]fter sending a series of letters, including the last one that warns of the consequences of a failure to respond, the interests protected by DR 7-104(A)(1) will have been satisfied and the lawyer justifiably can conclude that she does not ‘know’ that the debtor is represented by counsel.”²

Here, I asked you several times directly to confirm that you represent those parties, but in each instance you have evaded answering that question directly, with coy references to the “point of contact” engagement.³

Accordingly, please let us know whether Messrs. Amoses, the Board, and/or individual non-management members of the Board have retained counsel to represent them in this matter, be it Alston & Bird LLP or someone else, and we will be happy to direct our correspondence to their counsel.

Very Truly Yours,



Dimitry Joffe

cc: Andrew St. Laurent

² My last correspondence to you prior to sending the letter to Mr. Johnson expressly stated: “unless you tell me that Alston & Bird LLP or another law firm is counsel to Messrs. Amoses, the Board, and the individual non-management directors, we shall treat them as unrepresented parties.”

³ This was not the situation in AIU Ins. Co. v. The Robert Plan Corp., 851 N.Y.S.2d (N.Y. Sup. Ct. 2007), where the attorney argued that the opposing counsel “never indicated that it also represents the directors” – here, I repeatedly sought the answer to that very question from you, and your recalcitrant answers on their face demonstrate that you do not serve as their counsel. See also Niesig v. Team I, 76 N.Y.2d 363 (N.Y. 1990) (cited by the AIU court and stating that “today’s decision resolves the present controversy by allowing ex parte interviews with nonmanagerial witnesses employed by a corporate defendant”).

EXHIBIT G

(5) Aflac

From: Dimitry Joffe <dimitry@joffe.law>

04/03/2017 (a year ago) ☆

^{Sent} From: **Cassilly, Lisa** <Lisa.Cassilly@alston.com>

04/04/2017 (a year ago) ☆

To: Dimitry Joffe, Andrew St. Laurent

Show details

Mr. Joffe,

Your alleged confusion baffles me, but the answer is "yes," Alston & Bird LLP represents the Messrs. Amos, the Board and the individual directors in this matter.

Kind regards,

Lisa Cassilly

Lisa H. Cassilly
 Alston & Bird LLP
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 NYC Direct Dial: 212-905-9155
www.alston.com
 Atlanta Beijing Brussels Charlotte Dallas Los Angeles New York
 Research Triangle Silicon Valley Washington DC

From: Dimitry Joffe [mailto:dimitry@joffe.law]
Sent: Monday, April 3, 2017 5:31 PM
To: Cassilly, Lisa <Lisa.Cassilly@alston.com>
Cc: Andrew St. Laurent <andrew@sc-harris.com>
Subject: Aflac

Dear Ms. Cassilly,

Please see the attached correspondence.

Best regards,
Dimitry Joffe

This email is secured.